CASE AND COMMENT

Vol. 18 JANUARY 1912 No. 8

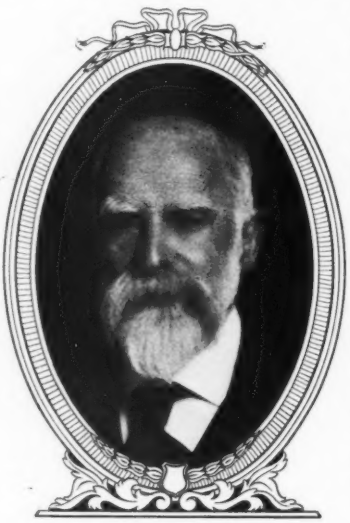
The Common Law

BY RIGHT HON. JAMES BRYCE

British Ambassador to the United States

NOT long ago I had occasion to read an opinion rendered on a point of law by an eminent legal practitioner in a Spanish-American country. The point itself was one which might have arisen equally well in the United States or in England. But the way of approaching it and dealing with it, the turn of thought, and the forms of expression, were curiously unlike those which one would have found in anyone trained in the common law, whether in the United States or in England. This unlikeness pointed to some inherent difference in the way of looking at and handling legal questions. Many of you have doubtless had a similar experience, and have been similarly led to ask what is at the bottom of this difference between the legal ideas and legal methods of ourselves, whose minds have been formed by the study of the common law, and the ideas and methods of the lawyers who belong to the European continent or to South and Central American states. French, German, Italian, Spanish lawyers are all more like one another than any of these are to Englishmen or Americans. The causes of this difference lie far back in the past. A similar difference would have been discernible in the seventeenth century, and might indeed have been even more marked then than it is now. Two hundred years ago the law of England had already acquired a distinctive quality, and that quality has remained distinctive until now, both here and in old England, although the substantive provisions of the law have been changed in many respects by the economic and social progress which the two branches of the race have made, and by the new conditions under which those branches live. We may still with truth speak of the common law as being the common possession of the United States and of England, because that spirit, those tendencies, those mental habits, which belonged to the English stock when still undivided, have been preserved. The causes that produced them belong to a period long anterior to 1776, when the ancestors of Marshall, Kent, Story, Taney, Webster, Curtis, were living in English villages side by side with those of Coke, Hale, Holt, Hardwicke, Blackstone, Eldon, and the other sages who adorn the English roll of fame. These causes were indeed at work far back in the Middle Ages. Just as the character of an individual man forms itself before he attains manhood, though the circumstances of his life modify it, while they reveal it to others, so in those early centuries were that set of ideas and that type of mind formed which took shape in the provisions and the procedure of the old law of England. The

substance of these provisions was partly general, that is, such as must exist in every organized and civilized society; partly special, such as the particular conditions of the country and the time needed. The form was due to the lawyers, whether judges, writers, or practitioners. Now the form has greatly affected the substance, and has proved hardly less permanent. When we study the growth of the common law we must think not only of the rules of inheritance, the doctrine of consideration for a contract, the definition of felony; we must think also of the forms of actions, of the jury, of the authority of decided cases. All these were already well settled before the first English colonist set foot on the American continent.



RIGHT HON. JAMES BRYCE

One hundred and thirty-one years have now passed since the majestic current of the common law became divided into two streams which have ever since flowed in distinct channels. Water is naturally affected by the rock over or the soil through which it flows, but these two streams have hitherto preserved almost the same tint and almost the same flavor. Many statutes have been enacted in England since 1776, and many more enacted here, but the character of the common law remains essentially the same, and it forms the same mental habits in those who study and practise it. An American counsel in an English court, or an English counsel in an American court, feels himself in a familiar atmosphere, and understands what is going on, and why it is going on, because he is to the manner born. You read and quote our law reports, though they are nowadays too largely filled by decisions on recent statutes; we read and quote yours, though embarrassed by the enormous quantity of the food (not all of it equally nutritious) which you annually present to our appetite. In nothing, perhaps, does the substantial identity of the two branches of the old stock appear so much as in the doctrine and practice of the law, for the fact that many new racial elements have gone to the making of the American people causes in this sphere very little difference. It is a bond of union and of sympathy whose value can hardly be overrated. . . . It is a bond of sympathy not least because it is a source of common pride. There is nothing of which you and we may be more justly proud than that our common forefathers reared this majestic fabric which has given shelter to so many generations of men, and from which there have gone forth principles of liberty by which the whole world has profited. The law of a nation is not only the expression of its character, but a main factor in its greatness. What the bony skeleton is to the body, what her steel ribs are to a ship, that to a state is its law, holding all the parts fitly joined together, so that each may retain its proper place and discharge its proper functions. The common law has done this for you and for us in such wise as to have helped to form the mind and habits as well of the individual citizen as of the whole nation. Parts of it they cannot understand; and when that is so, they had better not try, but be content to seek your professional advice. But it is all their own. They can remold it if they will. Where a system of law has been made by the people and for the people, where it conforms to their sentiments and breathes their spirit, it deserves and receives the confidence of the people. So may it ever be both in America and in England.

Thackeray and the Law

The Great Novelist's Membership in the Middle Temple

N the one hundredth anniversary of Thackeray's birth, which was celebrated on July 18th, says the London Law Journal, the legal profession has a special interest, for, like so many other famous men of letters, the author of "Pendennis" was a member of the bar. The benchers of the Middle Temple—where he was called in 1848—have celebrated Thackeray's connection with their inn by a banquet, at which some unreported speeches in his memory were delivered, a mistaken idea of so memorable an occasion having led them to regard the function as a private one. For all real lovers of the Temple, the Thackeray centenary has a much wider interest than that which the benchers of his inn were pleased to attach to it. The law itself never had any attraction for him. He entered the chambers of Mr. Taprell, at No. 1 Hare court, in 1831 to "read hard for the bar," and promptly discovered that he had no liking for the kind of training that was obtainable under a special pleader. "This lawyer's preparatory education," he wrote, "is certainly one of the most cold-blooded, prejudiced pieces of invention that ever a man was slave to. . . . A fellow should properly do and think of nothing else than law. . . . The sun won't shine into Taprell's chambers, and the high stools don't blossom and bring forth buds." This notion that the law is a jealous mistress, that she requires the undivided attention of her followers, is emphasized by Thackeray in his sketch of Mr. Paley in the famous chapter in "Pendennis," called "The Knights of the Temple," in which he compares the studious habits of that learned gentleman with the Bohemian ways of George Washington:

"How differently employed Mr. Paley has been! He has not been throwing himself away: he has only been bringing a great intellect laboriously down to the comprehension of a mean subject, and in his fierce grasp of that, resolutely excluding from his mind all higher thoughts, all better things, all the wisdom of philosophers and historians, all the thoughts of poets, all wit, fancy, reflection, art, love, truth altogether,—so that he may master that enormous legend of the law, which he proposes to gain his livelihood by expounding. Warrington and Paley had been competitors for university honors in former days, and had run each other hard; and everybody said now that the former was wasting his time and energies, whilst all people praised Paley for his industry. There may be doubts, however, as to which was using his time best. The one could afford time to think, and the other never could. The one could have sympathies and do kindnesses; and the other must needs be always selfish. He could not cultivate a friendship, or do a charity, or admire a work of genius, or kindle at the sight of beauty or the sound of a sweet song,—he had no time, and no eyes for anything but his law books. All was dark outside his reading lamp."

Thackeray, who abandoned his intention of following the bar within a few months of entering those dull chambers in Hare court, deemed it advisable, however, some seventeen years later, to renew his acquaintance with the "dusty purlieus of the law." He was encouraged by Monckton Milnes to entertain the idea of becoming, like Fielding, a London magistrate. How the project came to nothing is explained by a letter he wrote to Monckton Milnes a few months after he joined the bar at the Middle Temple in 1848: "You are a good and lovable adviser and M. P., but

I cannot get the magistrate's place, not being eligible. I was only called to the bar last year, and they require barristers of seven years' standing. Time will qualify me, however, and I hope to be able to last six years in the literary world; for though I shall write, I dare say, very badly, yet the public won't find it out for some time, and I shall live upon my past reputation. It is a pity, to be sure. If I could get a place and rest, I think I could do something better than I have done, and leave a good and lasting book behind me; but fate is over ruling." Fate was never more kind, for, although "Vanity Fair" had recently been completed when Thackarey penned these lines to his influential friend, "Pendennis" and "Esmond" had yet to be written, and probably they never would have been begun if Thackeray had been provided with a regular income. Before time had qualified him for a London magistracy, fame had destroyed the need or desire for it. For a while, however, he occupied chambers at 10 Crown Office row, and his name, with that address, appeared in the "law list" from 1849 to 1851. Subsequently, when he no longer entertained the ambition to become a metropolitan magistrate, his name adorned the doorpost of No. 2 Brick court, where Goldsmith's lively friends were wont to disturb the learned labors of Blackstone. A commemorative tablet already marks Goldsmith's residence at No. 2 Brick court, and the benchers of the Middle Temple would do a pleasing thing were they to place there a similar tablet to commemorate Thackeray's association with it.

Unlike Dickens,—also a member of the Middle Temple, but never called to the bar—Thackeray makes none of the principal figures in his books practising members of the legal profession. Arthur Pendennis's connection with the bar was not more intimate than his own, and nearly all the *habitués* of the inns whom he sketches have little or no concern with legal work. In one of his ballads there is an attractive picture of attorneys,—

> A-livin' at their ease,
> A-sending of their writs abowt,
> And droring in the fees.

But very few solicitors are to be met with in his novels. Mr. Bond in "Philip" being, perhaps, the most agreeable of the slightly sketched attorneys who are to be found in his pages. Thackeray appears, indeed, to have had no great liking for law or for lawyers. But no writer, not even Lamb or Dickens, had a finer veneration for the inns, or has given a more delightful description of life in the Temple:

"Those venerable inns which have the lamb and flag and the winged horse for their ensigns have attractions for persons who inhabit them, and a share of rough comforts and freedom which men always remember with pleasure. I don't know whether the student of the law permits himself the refreshment of enthusiasm, or indulges in poetical reminiscences as he passes by historical chambers, and says: 'Yonder Eldon lived; upon this site Coke mused upon Lyttelton; here Chitty toiled; here Barnewall and Alderson joined in their famous labors; here Byles composed his great work upon Bills, and Smith compiled his immortal Leading Cases; here Gustavus still toils, with Solomon to aid him;' but the man of letters can't but love the place which has been inhabited by so many of his brethren, or peopled by their creations, as real to us at this day as the authors whose children they were,—and Sir Roger de Coverley, walking in the Temple garden and discoursing with Mr. Spectator about the beauties in hoops and patches who are sauntering over the grass, is just as lively a figure to me as old Samuel Johnson, rolling through the fog with a Scotch gentleman at his heels on their way to Dr. Goldsmith's chambers in Brick court; or Harry Fielding, with inked ruffles and a wet towel round his head, dashing off articles at midnight for the Covent Garden Journal, while the printer's boy is asleep in the passage."

Some things have changed in the Temple since Thackeray's day, but the description of the hall of the "Upper Temple" in "Pendennis" still holds good:

"With the exception of some trifling improvements and anachronisms which have been introduced into the practice there, a man may sit down and fancy

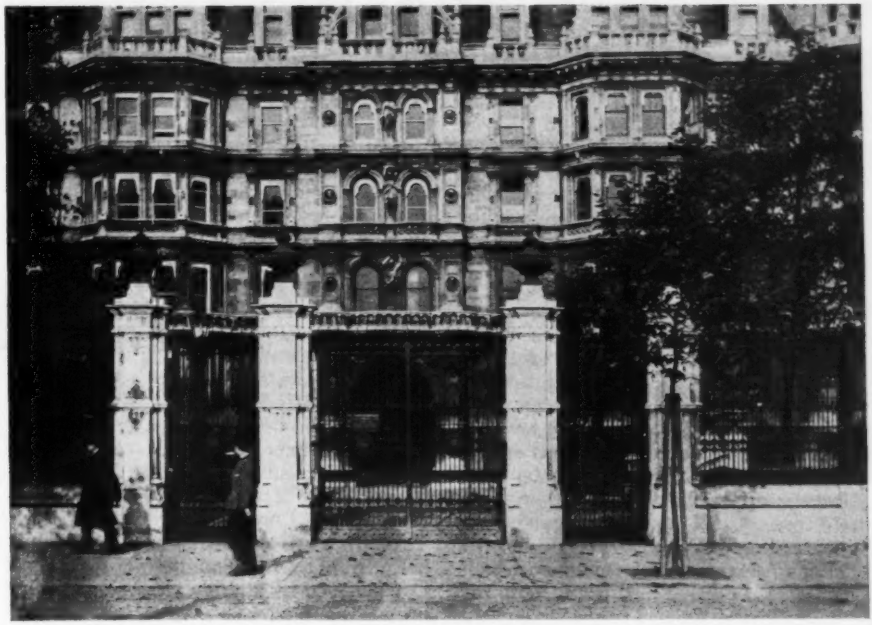


Photo by Boston Photo News Co.

The Temple—Famous in the Annals of English Law

that he joins in a meal of the seventeenth century. The bar have their messes, the students their tables apart; the benchers sit at the high table on the raised platform, surrounded by pictures of judges of the law and portraits of royal personages who have honored its festivities with their presence and patronage." Thackeray was too much of the literary man to concern himself with questions of law reform, though no doubt his vivid descriptions of the "sponging houses" into which Rawdon Crawley, with many another of his creations, was thrown, assisted to bring about a necessary reform in the law relating to debtors. His essay in Fraser, "On Going to See a Man Hanged," in which he gave a faithful account of the repulsive scenes at the execution of Courvoisier, helped, too, to create the public feeling of resentment which was ultimately expressed in the abolition of public executions. It was as a literary man that Thackeray looked at all things legal, and, although the members of the bar are justly proud that he, too, was a member of their profession, yet it is because of the imperishable words in which he has preserved the more picturesque side of life in the inns that they have a special reason for revering his memory.

Ed. Note.—In the next article entitled "Cowper and the Law" His Honor Judge William Willis K. C., tells of the poet Cowper's connection with the Middle and Inner Temples.

Cowper and the Law

BY HIS HONOR JUDGE WILLIAM WILLIS, K. C.

T the annual meeting of the Cowper Society, held recently in the Old Hall, Lincoln's Inn, his Honor Judge Willis, K. C., a bencher of the Inner Temple, the inn of which Cowper himself was a member, said:

On the rolls of the four inns of court may be found the names of men who, by the study and practice of the law, obtained no distinction, but who, as statesmen, orators, scholars, and poets, have obtained imperishable fame. Among these, one of the most distinguished is William Cowper, the great master of epistolary correspondence, and an excellent poet. He was a member of both the Middle and the Inner Temples. The society of the Middle Temple has published a volume containing the names of its most distinguished members, but among them the name of William Cowper does not appear. Although his poetry must be well known to the masters of that great society, his connection therewith seems to be forgotten. It is not too much to say that an accurate statement of Cowper's connection with the two inns of court cannot be found in any biography which has been published of him.

He was entered as a student of the Middle Temple on April 30, 1748, while he was yet a scholar at Westminster. His father was then alive, and he is described as *hæres apparens* of his father, the rector of Great Barkhamstead. It is clear that Cowper was intended to be a barrister, and he was called to the bar by the Society of the Middle Temple on June 14, 1754. I do not think there is any justification for the statement that he was articled to Mr. Chapman for three years. He would scarcely be articled unless he intended to become a solicitor. He would find his way into the chambers of Mr. Chapman for the purpose of seeing the practice of the law as a pupil. While living in Mr. Chapman's house, Cowper found himself near to the home of his uncle, Ashley Cowper, and instead of rendering service in the office, as would be expected if he were articled, he seems to have spent a very large portion of time in visiting the home of his uncle, where could be seen two cousins of great beauty and attractive manners, Theodora Jane Cowper, and a sister, who became, and is known chiefly under the name of, Lady Hesketh. A fellow pupil in the chambers of Mr. Chapman was a young man named Edward Thurlow, destined to obtain high distinction in the law as Lord Chancellor Thurlow. These two seem to have played and laughed with the daughters of Ashley Cowper nearly all day, and apparently little attention was paid by either of them to the study of the law. Mr. Hayley tells us that Cowper rambled from the thorny road of jurisprudence to enter upon the primrose paths of literature and poetry. For my part, I do not think he entered upon the thorny road of jurisprudence; if he had, he would have found the charms of legal studies as great as those of science or the poetic arts. I think that Cowper's stay at Mr. Chapman's was only that of pupilage. In Cowper's memoir of his early years he says he "was sent to acquire the practice of the law with an attorney." He says nothing about being articled to an attorney.

After three years' residence at Mr. Chapman's, ending in 1752, Cowper took chambers in the Middle Temple, and thenceforth resided in the Temple for eleven years. The chambers he first took were chambers belonging to the Middle Temple, and situate in Pump court. In June, 1754, he was called to the bar by the Honorable Society of the Middle Temple. He subsequently, in the year 1757, took chambers in the Inner Temple, and if his connection with the Inner Temple had only been that of

possessing chambers within the Inn, I should not mention his name in connection with that Honorable Society, nor would the poet himself. In 1757 he decided to pass from the Society of the Middle Temple into the Society of the Inner Temple. The entry of his admission can still be seen among the records of the Inner Temple. Cowper paid the sum of 40 shillings to be admitted *ad eundem* at the Inner Temple. He was received upon a certificate of the Middle Temple, stating his admission, with the time thereof, and this certificate is entered in substance upon the records of the Inner Temple. It is not accurate, therefore, to say that three years after his father's death, which would be in 1759, he removed to a set of chambers in the Inner Temple. He became a member of that House, and, though the Inner Temple did not call him to the bar, it was his ultimate choice to be a member of its society.

The following is a translation of the entry on the records of the Inner Temple: "Cowper, William, Esquire, son and heir apparent of the Reverend John Cowper, of Great Barkhamstead, in the county of Hertford, D. D., who was admitted of the Socieety of the Middle Temple, London, the 29th day of April in the year of our Lord 1748, as appears from the certificate from the Middle Temple aforesaid, now admitted in the society of this fellowship in consideration of 40 shillings, as appears by our hands 15th day of April in the year of our Lord 1757."

While Cowper was at the Inner Temple he scarcely examined a law book, and delighted to be in the society of the wits of his day, many of whom have obtained a bad reputation. He joined a club styled "The Nonsense Club," and wrote for it three or four papers with a light and gentle touch which foretold the elegance and purity of the writer of the letters. It is sad to think that three of his associates were destroyed by their vices.

There is no evidence that Cowper ever appeared in court to practise. He became a commissioner of bankrupts, an office which he held for some years. The story of his depression and distress in the Temple is well known. His mind gave way, and he was placed eventually under the care of Dr. Cotton, in his home for lunatics, at St. Albans. Cowper entered it in December, 1763, and under kind treatment his health greatly improved, and at length a glance at a verse in Paul's Epistle to the Romans, accompanied by the Spirit's presence and power, created in him a new life, a life in Christ. This life gave him intense joy. He was completely restored to health, both physical and mental, and he left the asylum, July, 1765, a believer in Christ, and became, by the divine care, a poet whose utterances have enriched succeeding generations.

Photo by Boston Photo News Co.

Photo by Boston Photo News Co.

TOMB OF KING JOHN, WORCESTER CATHEDRAL, ENGLAND

King John and Magna Charta

The Rise of Constitutional Law

BY HON. U. M. ROSE

Of the Little Rock (Arkansas) Bar

[Judge Rose was president of the American Bar Association in 1901-1902 and was appointed United States Delegate to the Second Hague Peace Conference (1907) with rank of Ambassador.]

IF any of us had been living, and had been in the cathedral of Worcester, England, on the 17th day of July, 1797, he would have beheld a strange sight. The doors of that immense building were closed and bolted from within, and the light, sifted through richly stained windows, revealed a group of men gathered around a tomb of antique aspect, which stood, and still stands, in the choir just before the high altar. On the top of the tomb was the recumbent figure of a man, his hands encased in jeweled gloves, the palms pressed together as if in prayer. Some of the men there present were mechanics, with hammers, chisels, and crowbars, with which they proceeded to pry off the ponderous covering of the tomb, of which the mar-

ble effigy formed a part. Beneath was found a coffin, likewise of marble, broken across, as was supposed, long before that time, when the tomb had been removed from some other part of the building for the purpose of making repairs.

Nearly 600 years had passed away since King John had been laid to rest in that tomb, with an unparalleled dreath of tears.

There had been some controversy as to the precise spot in the cathedral in which lay the body of John; some antiquaries contending that it lay beneath the pavement where the tomb had formerly rested; a spot still marked by a marble slab; others contending that John was buried at Croxton, as stated by one old author. Finally, Mr. Green, the historian of Worcester, with some others, obtained the consent of the dean and chapter of the cathedral, that the tomb might be opened, so that all doubts might be dispelled. When the lid of the coffin was lifted it disclosed all that was left of the dead monarch. A drawing was made of the open tomb, which has often been reproduced. The skeleton measured 5 feet 6 inches in length, the forehead was heavy and narrow, as shown in all of the pictures of John. The truth of history was confirmed. When the King was alive an ambassador had said of him: "The King of England is about fifty years of age, his hair is quite hoary; his figure is made for strength,—compact, but not tall."

Although the King's body had been embalmed by his physician, Thomas de Wodestoke, abbot of Caxton, yet the balsams and spices had not availed in the long warfare waged by the elements; and the flesh had disappeared. The body had been clad exactly as represented by the effigy that lies on the tomb, except that the hands were not encased in gloves, and that, in lieu of a kingly crown, it wore a monk's cowl, put on at the King's dying request, in the hope that it might scare the devil away, or deceive the keen vision of the Angel of the Resurrection. It was in the same frame of mind that John requested that he might be entombed in this spot, so that he might sleep near the bodies of the holy saints Wulfstan and Oswald, who, as he trusted, would charitably intercede for him at the last day. By means of these prudent precautions, he hoped to slip along with the elect into the Kingdom of Heaven.

But let us look once more, and see what he had left behind him in token of his mortal life.

The head having been slightly elevated, the skull had become detached from the rest of the skeleton, which had been clad in a long robe of crimson damask of peculiarly strong texture. A part of the embroidery of the robe remained near the right knee. The legs were covered with an ornamental close dress tied at the ankles, and the bones of the feet were visible through the decayed parts of the drapery. A sword that had been clasped in the left hand had been eaten by rust into pieces, which lay scattered down the same side of the body. The right hand, which had become detached, lay on the right thigh of the skeleton.

A sword that time had broken as if in mockery, a skull masquerading in the headdress of a monk, a few decaying bones and vestments were the only visible remains of a once powerful monarch, the greatest enemy of free government that was ever seen in England. It is easy to conclude that these vestiges of mortality were regarded by those present with curiosity rather than with reverence. Other churches may contend in devout rivalry as to the respective merits of saints whose relics, shrines, or tombs they possess; but it will perhaps be universally conceded that the cathedral of Worcester holds entombed within its consecrated precincts one of the vilest of the champions of wickedness. . . . .

John's Iniquities.

John was prolific in his devices for raising money, including all the resources of slander and blackmailing; thus, he shamelessly entered on his rolls memoranda such as this:

"Robert de Vaux gave five of his best palfreys that the King might hold his tongue about Henry Pinel's wife." In some years he levied taxes on all movables of more than 14 per cent. Against

all who offended him, his vengeance was swift and terrible. On one of his raids on the Isle of Wight, he made it a rule to fire every morning the house that had sheltered him the night before. Levying fines on Jews, torturing them until they surrendered the last penny, and making forced levies on Christians, were regular financial expedients. . . . .

Maid Marian.

There were other misdeeds that called for the wrath of God and the avenging fury of men. With licentious passions he sought to spread dishonor through noble families, until a cry arose against him such as had been heard against Appius Claudius at Rome:

"Patient as sheep we yield us up unto your cruel hate;
But, by the shades beneath us, and by the Gods above,
Add not unto your cruel hate your yet more cruel love."

I may mention only one other exploit of John that contributed most powerfully to bring him to judgment. When the mailed barons went forth with all of their forces to settle their long account with the King, Robert Fitz-Walter, Baron of Dunmow, rode foremost in the van, having been elected as their leader, under the title of "Marshal of God and the Holy Church." Many in that band had some personal wrong to be avenged, but by common consent it was conceded that none had been so deeply wronged as he; and in the tremendous catalogue of his grievances, the fact that John had set fire to his castle, the ancestral home of his family, and had burned it to the ground, went for nothing. After the death of John, Fitz-Walter was a broken man. He went to Palestine, and fought against the infidel for the sepulchre of Christ. We hear of him actively engaged at the siege of Damietta. In 1234 he died; no one knows where, or from what cause; but his tomb may still be seen in Little Dunmow Church. Very near it, and on the south wall, is an altar-shaped tomb on which is carved in alabaster the form of a girl of eighteen, richly dressed. Her figure is tall, extremely slender, lithe, and graceful. She wears the headdress of the period, fitting closely over the brow; and her tresses are parted over an oval face of singular sadness, sweetness and beauty. Her open hands are held near together in an attitude of resignation and prayer; but the unoffending grace that lights up every feature tells that she had but few sins to be forgiven. Nearly 700 years have gone since the maiden gathered daisies in the English meadows, and listened to the song of the lark soaring toward Heaven. Not the gloom of penitential Lent, nor the happy Christmas chimes rung out from the tower above, nor the chants of the worshipers on each recurring Sunday and festival, nor the deep tones of the organ that shake the building to its foundation, suffice to rouse the pulse that seems as if just suspended.

"The fragrant tresses are not stirred,
That lie upon her charmed heart.
She sleeps; on either hand upswells
The good-fringed pillow, lightly prest.
She sleeps, nor dreams, but ever dwells
A perfect form in perfect rest."

Gazing upon this reclining figure, one might almost deem that he had before him the Sleeping Beauty of fable, lying here while the centuries are slowly tolled away by the clock in the tower above, waiting for the coming of the Happy Prince, whose kiss shall waken her to life and love.

The maiden thus sleeping has been the theme of countless ballads. She is the original of that Maid Marian, that has walked in glory through a thousand romances. Her history has often been reproduced on the stage in dramas, with every variety of transformation consistent with the purity of her character; though no pen save that of Shakespeare himself could have done justice to her pathetic fate.

That lady, thus commemorated in art, history, romance, and song, was Matilda, the daughter of that Robert Fitz-Walter, who, with his good broad sword, rode in the van of the army of the barons as it pursued the cowardly King along the line of his dastardly retreat. She was the light of his house, the joy of his heart. Her hapless story is soon told. Just blooming into womanhood, the fame of the wonderful beauty of Matilda Fitz-

Walter was spread abroad in all the land; and so it came to the ears of the King, who caused her to be abducted by the ruffians whom he kept in his pay. As she rejected his advances, she was confined in the Tower in a room that is still shown, next the roof in the round turret standing on the northeast angle of the keep, where, after an imprisonment of a few months, she was secretly poisoned by order of the King.

We may wonder how, with so many misdeeds, such a monster could have been permitted to live; but it seems quite probable that he was poisoned in the end; and besides, a King in those days, defended by guards, was also protected by influences that were overpowering in the minds of men. . . . .

Binding a King.

The reign of King John, and the successful revolt against his tyranny, present in a very striking way the perplexing interaction of good and evil. The most destructive thunder storm serves to purify the air; and the rankest soil brings forth the most beautiful flowers to captivate the eye, and to enrich the winds with their perfume. Had John been a better or a wiser King, the revolution, delayed through centuries of suffering, must have broken forth at last with that devastating energy that smooths the way for the career of a Robespierre or a Danton. But enormous crimes awakened invention. The idea of binding the King by a formal contract, the King, ruling by divine right, the King, who was the fountain of honor, and who could do no wrong, daring in its novelty, was utterly at war with all the precedents of history, all of the traditions of our race. Unworthy Kings might be dethroned or slain, to be followed by others as bad, or perhaps worse; but to bind the King and his heirs with a mere parchment assumpsit was so like the drawing out of a leviathan with a hook, or binding Samson with a pack thread, that to many it must have seemed audacity degenerating into frenzy. This bold thought probably originated in the brain of Stephen Langton, a name never to be mentioned without respect.

Archbishop Langton.

Langton was an Englishman; but the time and place of his birth have baffled modern inquiry. He received his principal instruction at the University of Paris, where he became renowned for learning and ability; so much so that, though a foreigner, he was made Canon of Paris, Chancellor of the University, and Dean of Rheims.

In 1207 Langton was appointed Archbishop of Canterbury by Pope Innocent III., and proved to be a man of great firmness and intrepidity of mind. Profoundly scandalized by the crimes and indecencies of John, he resolved to curb the power that rendered such infamies possible. He found somewhere an old charter of Henry I., dated about 1100, concerning certain privileges to his subjects; and of this he made good use, though, as it did not purport to bind the successors of that monarch, it had been generally forgotten. To Langton, though no longer of any legal validity, it had a certain value as a precedent. In the century and a half that had elapsed since the time of the Norman conquest, the Normans and the Saxons had become thoroughly fused into one body, and there was a growing sentiment in favor of the restoration of the liberal and less oppressive laws of Edward the Confessor.

A Convocation of the peers and ecclesiastics having met in 1214 in St. Paul's, Archbishop Langton read the charter of Henry I., recounted some of the enormities of John's recent conduct, telling them that if they were willing to support this chapter their long lost liberties would be restored in all of their original purity of character; which, we are told, "so animated the minds of all present that with the greatest sincerity and joy they swore in the archbishop's presence that at the proper season their deeds should avouch what they then declared; and that even unto death itself they would defend those liberties." Langton promised his co-operation and assistance, and assured the barons that the covenant then made would reflect honor on their names through successive generations. . . . .

The Revolt of the Barons.

On the 20th of November, 1214, he met the barons at St. Edmund's Bury, where a solemn oath was taken to preserve the liberties of England; and recourse to arms was resolved upon. Destitute of means for defraying the expense of war, and deserted by most of his subjects, the King endeavored to temporize. He would have been willing to take any number of oaths; but, as he had already taken many, and had violated them without compunction, no one was willing to accept his most solemn pledges.

As the barons advanced, the King retreated from Oxford to London. His adversaries, having opened communication with the inhabitants of that city, followed with a large army in the footsteps of John; the city gates were thrown open to them on the 24th of May, and the King hastened to shut himself up in the Tower, whence, finding himself helpless in the midst of his subjects, he began negotiations with the barons, resulting in a promise to meet them at Runnymede on the 5th of June.

The name "Runnymede" is derived from two Saxon words meaning Council Meadow, because in the old Saxon days it had been customary to hold the great councils there from time immemorial. It is an island in the Thames, between the little village of Staines, near Windsor, a meadow of 160 acres, very level, and quite suitable for meetings such as were held there. No more rural or peaceful scene could be found than this spot, where the greatest of all human issues was settled by an event more important than any battle that was ever lost or won.

The Great Charter.

In preparation for this meeting, the barons, by the aid of Archbishop Langton, had prepared certain articles containing a schedule of the liberties upon which they meant to insist; and these were substantially incorporated in the Great Charter, which bears date June 15, 1215. The King had at first rejected the offered terms, which he said would reduce him to slavery; but finally he succumbed. Bankrupt in finance, in reputation, and in influence, no other way was open to him than that of a misleading and deceitful surrender. . . . .

Many of the abuses denounced by the Magna Charta have long ceased to be living issues; but every part of it is interesting as showing the evil customs that had grown up, and the enormous part that it plays in constitutional history, though I purpose to mention only the more important features of that celebrated instrument.

The English Church was to be free, and to have her whole rights and her liberties inviolable. What we should call the inheritance tax and the right to extraordinary aids were strictly limited. If the heir was a minor, he was to be exempt from the inheritance tax; and the estates of minors were protected against unjust exactions. The city of London should have its ancient liberties and its free customs; and so of all other cities, burghs, towns, and ports. The courts were no longer to follow the person of the King; but were to be held in a certain place. Punishments were to be proportioned to the offense. In the administration of the estates of deceased persons, relatives and friends should be preferred. Horses and carts should not be impressed without the consent of the owner; and so of wood. Forfeitures for felonies should last only a year and a day. There should be only one standard of weights and measures.

In those days, if one was arrested on any charge, and put in prison, he was frequently left to languish there indefinitely, unless he would pay liberally for an early trial. To put an end to this practice of blackmailing, the Magna Charta contains this clause, the germ of the habeas corpus act: "Nothing in the future shall be given or taken for the writ of inquisition of life or limb; but it shall be given without charge, and not denied."

As the bailiffs were an inferior order of judges, very obsequious to power, and much given to blackmailing, it was provided that no bailiff should cause anyone to be arrested on his own simple affirmation, without creditable witnesses produced for that purpose.

All merchants should have safety and security in coming into England and going out of England, whether traveling by land or by water; to buy and sell without any unjust exactions, except in time of war; and even in time of war, if English merchants were granted safety in the enemy's country, his merchants should be safe in England. And all persons should have the right to go out of the Kingdom, and to return at will, except in war for some short space, and except prisoners and outlaws.

The King was not to appoint any judicial officers "excepting such as know the laws of the land, and are well disposed to observe them."

The King was to restore all lands unjustly seized, and to remit all fines unjustly imposed; and if any dispute should arise on the subject, it was to be decided by the council of peers.

In the year 1215 no crusade in favor of woman's rights had as yet been preached; but the ladies were not forgotten.

In those days of continuous hard fighting, there were always many widows in the land; and some of them were rich, high prizes in the matrimonial market. Certain astronomers think that the heat of the sun is kept up by showers of meteors that are always falling into it. In the reign of John rich widows were utilized in keeping up the revels of the court. In fact rich widows were confiscated. Given a rich widow, she was commanded to marry one of the royal favorites, who was to divide the spoils with the King. When the King and the royal favorite had squandered the widow's estate, and had broken her heart, and, having accomplished her *via dolorosa,* she was dead and buried in some spot of consecrated ground, the royal favorite was ready for another widow; and this law of supply and demand operated unspent.

To remedy this evil the Great Charter provided that no widow should be compelled to marry while she was willing to live without a husband.

The charter farther provided as follows:

"A widow, after the death of her husband, shall, immediately and without hindrance, have her marriage and her inheritance; nor shall she give anything for her dower or for her marriage or for her inheritance which her husband and she held at the day of his death; and she may remain in her husband's house forty days after his death, within which time her dower shall be assigned," a provision still remaining in force in the great majority of our states.

No officer was to take any corn or other goods without paying for them immediately.

Courts of assize were to be held four times a year in each county. And then the Great Charter contains such a guaranty of personal liberty as had never been dreamed of before.

"No freeman shall be seized or imprisoned or dispossessed or outlawed or in any way destroyed; nor will we condemn him, or commit him to prison, except by the legal judgment of his peers, or by the laws of the land. To none will we sell, to none will we deny, to none will we delay, right or justice."

Respecting this clause Sir Edward Coke says:

"As the gold-finer will not, out of the dust, threads or shreds of gold let pass the least crumb, in respect of the excellency of the metal, so ought not the learned reader to pass any syllable of this law, in respect of the excellency of the matter."

Again, he says that this clause is "worthy to be written in letters of gold."

The Magna Charta was not merely a covenant between the King and the barons; but its light was reflected through the whole social system; for at the close of it provision is made in these words:

"Also, all these customs and liberties aforesaid, which we have granted to be held in our Kingdom, for so much of it as belongs to us, all our subjects, as well clergy as laity, shall observe towards their tenants as far as concerns them."

The chief infirmity of the charter of Henry I. was that it possessed no sanction, and could at any time be violated with impunity. But now, for the first time in history, we have a charter that provides remedies for its enforcement. The King declares: "But since we have granted all these things aforesaid for

God, and for the amendment of our Kingdom, and for the better extinguishing the discord which has arisen between us and our barons, we, being desirous that these things shall possess unshaken stability forever, give and grant to them the security underwritten."

The charter then provides that the barons shall elect twenty-five representatives who are to judge as to the infringement of any of its covenants; and in case any breach is found, the King says: "And they, the twenty-five barons, with the community of the whole land, shall distress and harass us by all the ways in which they are able; that is to say, by the taking of our castles, lands, and possessions, and by any other means in their power, until the excess shall have been redressed according to their verdict, saving harmless our person, and the persons of our Queen and children; and when it hath been redressed, they shall behave unto us as they have done before. And whoever of our land pleaseth may swear that he will obey the commands of the aforesaid twenty-five barons in accomplishing all the things aforesaid, and that with them he will harass us to the utmost of his power; and we publicly and freely give leave to everyone to swear who is willing to swear; and we will never forbid any to swear. But all those of our land who of themselves, and of their own accord, are unwilling to swear to the twenty-five barons to distress and harass us, together with them, we will compel them by our command to swear as aforesaid."

This was pretty strong language, since it gave to the barons the right of judging when the charter was infringed, and the remedy to be applied. But this was not all. The barons were to have the custody of the city and Tower of London until the 15th of August then next ensuing, and until the charter should be carried into execution. . . . .

Attempted Annulment of Charter.

John, who, though an unmitigated ruffian, was not wanting in cunning, had one trump card left. Having become a vassal of the See of Rome, he threw himself on the protection of the Pope, who responded, on the 16th day of December, 1215, by issuing a bull annulling the Great Charter as having been obtained by duress, and excommunicating thirty-two of the insurgent barons, including, of course, the twenty-five who had been elected as guardians of the rights which it established. It was quite true that the charter had been obtained by duress; but, as the Norman claim to the Crown rested on no higher or better title than the right of conquest, honors were easy. Besides, the doctrine of duress has no application to judgments resulting from the arbitrament of the sword.

John, from his point of view, had no reason to be pleased with the outcome of the meeting at Runnymede. He was so infuriated that he resolved to consider the charter, which he had never intended to obey, as absolutely void. Old Hollinshed tells us that after he had sealed it, "he was right sorrowful in his heart, cursed the mother that bore him, the houre that he was borne, and the paps that gave him sucke, wishing that he had received death by violence of sword or knife, insteade of natural nourishment; he whetted his teeth; he did bite now on one staffe, and now on another as he walked; and oft broke the same in pieces when he had doone, and with such disordered behavior and furious gestures he uttered his greafe, in such sort that the noblemen very well perceived the inclination of his inward affection concerning these things before the breaking up of the councell, and therefore sore lamented the state of the realm, gessing what would become of his impatience and displeasant taking of the matter."

It is often said that governments are not made; but that they make themselves. The Magna Charta, the first germ of constitutional law, the first step in the path of law reform, was not the product of academic or philosophic leisure; but was a practical measure of relief against evils that had become intolerable, a child of stern necessity. Subsequent experience has vindicated the unconscious wisdom that was born of despair.

John began to make war on his barons for the annulment of his charter soon after it was sealed, relying largely for success on the influence of the papal

bull. Late in September of the next year, he reduced the city of Lincoln, and distributed all the lands of the barons lying thereabout among his followers. He then marched toward Lynn, where his supplies were deposited. Thence he moved toward Wisbeach. He and his army crossed the Wash, and then, looking back, he saw his whole train of baggage and provisions swept away by the rising tide. In this disaster he lost all his money, jewels, regalia, his crown, and the great seal. In the direst distress he proceeded to the Cistercian Abbey at Swineshead, where he contracted some malady, of which he died on Wednesday, October 12, 1216, in the forty-ninth year of his age, after an inglorious reign of seventeen years, seven months, and ten days. It is reported by some of the chroniclers that he was poisoned by a monk who wished to rid the world of such a monster. According to others, he died from an act of gluttony.

Tomb of Littleton.

As I have mentioned the cathedral at Worcester, and shall have to mention it again presently, and as I am speaking to lawyers, I cannot refrain from saying that there also lies our old friend Littleton, whom we know mostly through the writings of Coke. Perhaps a new edition of his works, in their old Norman French, would not sell quite so extensively as some of our modern novels, yet he did a good work in his day. Death makes strange bedfellows. Here lies the old hard working lawyer, who first sought to explore in a thorough manner the occult mysteries of the feudal tenures, within a few paces of the last resting place of the King who by his crimes laid the ax to the root of the feudal system in England. Littleton ceased from his labors, and entered upon his rest, in 1481. . . . .

A Magical Parchment

Strange thoughts come to one that looks at the ancient charter in the British Museum. Shakespeare puts into the mouth of Jack Cade these words:

"Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment; that parchment being scribbled o'er, should undo a man?"

So this parchment, on which the Great Charter is written, is the skin of an innocent lamb that once bleated in the English fields, which being scribbled o'er with words of magical import, written in a language long since dead, while it brought the heads of Laud and Strafford and Charles to the block, has given life and hope to the oppressed, has opened the prison door for the persecuted and friendless, and shall do so again for all generation, world without end. What a strange potency in this little sheet of parchment. A breath of wind might blow it away. But the head of the church on earth had invoked the wrath of Heaven upon it, kings had renounced it, physical fire had charred it, and in the irony of fate a pair of tailor's shears had threatened it; and yet here it remains, powerful and indestructable as ever, announcing its deathless and indelible message, speaking from eternity to eternity. This little sheet of shriveled parchment has revolutionized the history of the world. Without it the growth of England and the political existence of America would never have been. . . .

To the doubter and the man of little faith, the charter was merely a ripple on the stream of time. In the nature of things it must soon pass away and die with the impulse in which it had its origin. In point of fact these prognostications were seemingly fulfilled.

Curran said that "eternal vigilance is the price of liberty." But there can be no liberty that is not based on law. That is what the barons knew; and that is why they reduced the charter strictly to the form of law. When the law is gone, the fabric of liberty, deprived of all support, crumbles to its very foundations, as happened in the long and ruinous wars of the Roses, during which the charter drifted completely out of sight. The governments of Henry VIII., of Queen Mary, and Queen Elizabeth were as thoroughly despotic as that of King John. James I. preached the doctrine of the divine right of kings and the duty of implicit and unquestioning obedience of their subjects in his pedantic and maudlin way, as the most important of all divine

truths; but he has not the courage of his convictions. But, partly because of the invaluable truths that it announced, and partly because of the striking and spectacular manner in which it had its birth, the charter was bound to triumph over oblivion. If liberty seemed to have perished along with law, the charter was the talisman that was destined to awaken it to life again. The rebellion against Charles I. was but a second Runnymede.

. . . . .

Prince Charles at Worcester.

And this thought takes us back once more to the old cathedral of Worcester. On the 3d day of September, 1651, a young man, self-absorbed and anxious in demeanor, accompanied by two or three attendants, entered this building, and, sweeping by the tomb of John, he hastily ascended to the tower above. This was Prince Charles, afterwards Charles II. From the summit of the tower he beheld the troops of Cromwell crossing the river on a bridge of boats; and it was not long before the tower seemed to reel with the reverberation of the opposing artillery. And then he beheld, a few hours later, the irresistible Puritans driving the Royalists on their last retreat through the lanes and streets of the city. Descending from his lofty perch, he endeavored to rally them; but in vain. Under the shadow of the cathedral, where his unworthy ancestor had been sleeping for centuries, seeing that the die was cast, he exclaimed: "I would rather that you would shoot me down than to let me live to see the sad consequences of this day." He was at last to be King of England, not by right of conquest, but only with the consent of her people, with not a single word of the Great Charter effaced. . . . .

Worth all the Classics.

In the House of Lords, on the 9th day of January, 1770, the great Earl of Chatham, in speaking of the barons, said:

"My lords, I think that history has not done justice to their conduct when they obtained from their sovereign that great acknowledgment of natural rights contained in Magna Charta. They did not say these are the rights of the great barons, or these are the rights of the great prelates. No, my lords, they said in the simple Latin of the time, *Nuilus liber homo,* and provided as carefully for the meanest subject as for the greatest. These are uncouth words, and sound but poorly in the ears of scholars; neither are they addressed to the criticism of scholars; but to the hearts of freemen. There three words, *Nullus liber homo,* have a meaning which interests us all; they deserve to be remembered; they deserve to be inculcated in our minds; they are worth all the classics."

No one can sum up the debt that we owe to the Magna Charta, the one great product of the Middle Ages. We look back with feelings of aversion and pity to that dark and troubled period; to its insane crusades, to its fanatical intolerance, to its pedantic and barren literature, to its scholastic disputes, to its cruelty, rapine, and bloodshed. But the genius that presides over human destiny never sleeps; and it was precisely in that most sterile and unpromising age that the groundwork was laid for all that is valuable in modern civilization. As an unborn forest sleeps unconsciously in an acorn cup, all the creations and all the potentialities of that civilization lay enfolded in the guaranty of personal liberty and of the supremacy of the law that was secured at Runnymede. The various bills and petitions of right, and the habeas corpus act, while they have given new sanctions to liberty, are but echoes of the Great Charter; and our Declaration of Independence is but the Magna Charta writ large, and expanded to meet the wants of a new generation of freemen, fighting the battle of life beneath other skies.

"Worth all the classics!" Yes, the classics that have survived, and the classics that have perished. Dear as might be to us the lost books of Livy, whose pictured page is torn just where its highest interest begins, or even some song of Homer, which, now lost in space, shall charm the ear and bewitch the human heart no more, we could not exchange for them a single word of those uncouth but grand old sentences, which, having taken the wings of the morning have incorporated themselves with almost every system of laws in Christendom.

The Value of Modern English Decisions to the American Lawyer

BY EDWIN S. OAKES

> "All law is truly of the present; the past is no more, except in so far as its forces operate in the present; and the future is not yet, except in so far as it is already a condition in the present. The present is therefore a union of the past and future. It alone is real."—Bluntschli, Geschichte der neueren Staatswissenschaft.

HE reporting of particular cases or examples," says Coke,[1] "is the most perspicuous course of teaching the right rule and reason of the law;" and none may be found to gainsay him. The reason for this is not far to seek; it lies in the racial unwillingness to accept an abstract principle until its practical application is seen and approved. This is a salient feature of Anglo-American jurisprudence, and as such has come under the observation of juristic commentators. Instance the following passage: "It is one of the distinguishing characteristics of the English race, whose political habit has been transmitted to us through the sagacious generation by whom this government was erected, that they have never felt themselves bound by the logic of laws, but only by a practical understanding of them, based upon slow precedent. For this race, the law under which they live is, at any particular time, what it is then understood to be, and this understanding of it is compounded of the circumstances of the time. Absolute theories of legal consequence they have never cared to follow out to their conclusions. Their laws have always been used as parts of the practical running machinery of their politics,—parts to be fitted from time to time, by interpretation, to existing opinion and social condition."[2] The same idea has been pithily expressed by Mr. Justice Holmes: "The life of the law has not been logic; it has been experience."[3]

That this slow process of shaping the law to our needs has its shortcomings is not open to dispute; but its defects are a necessary incident of the method. Every lawyer is ready to admit the truth in Tennyson's characterization of

> " . . . the lawless science of our law,
> The codeless myriad of precedent,
> That wilderness of single instances,"

without, however, acknowledging the justice of its implied reproach. So long as the law is a growing science,—or, in the phrase already quoted, so long as our understanding of it is compounded of the circumstances of the time, it cannot be completely reduced to formulas. Its want of absolute certainty is the price we pay for its flexibility. The law cannot continue to grow toward justice unless it is free to enrich itself from the present as well as the past experience of mankind.

And it is precisely because the law is doing this that the lawyer must keep in touch with contemporary decisions. He cannot get along without them. The experiment has been tried at a period in English judicial history, some 400 years ago, when it was supposed that existing decisions embodied all the principles essential to the administration of justice; and only a few years were necessary to demonstrate its impracticability. The law is the product of conditions as well

[1] Reports, preface to part 5.
[2] "The State," by Hon. Woodrow Wilson.
[3] "The Common Law."

as of principles, and therefore is not, nor can it be, a finished science.

In keeping in touch with contemporary case law, the lawyer should not confine himself to the decisions of his own state, and this for two reasons: The first of these is found in the prevalent conception of law as the instrument of social justice, which renders necessary a resort to comparative jurisprudence; and the second, which springs from the first, is that a novel tendency originating in the courts of another state or of England may produce a change of views in his own state.

But why, it may be asked, need we, with a mountain of case law at our doors, turn to the modern decisions of the English courts? The answer to this inquiry lies in this, that in order to render the precedent system workable, and to keep it from breaking down under its own weight, two things are necessary; first, it must be kept free from deadwood by the discovery of just distinctions between modern cases and ancient precedents; second, the reaction of changing economic and social conditions upon the law must be kept in view. It is the purpose of this article to demonstrate the way in which a study of modern English decisions may contribute toward the solution of this difficulty; and to show that they are not only of interest to students of comparative jurisprudence, but are of practical value to the busy lawyer.

Upon the decisions themselves, or rather upon their manner of expression, it is unnecessary to expatiate. The constitution of the chief tribunals of England is such as to insure their recruitment from the best talent of the English bar[4]. The opinions in each case are usually confined to the discussion of but one or two clear-cut questions, and are generally marked by a clarity of reasoning which renders them models of judicial exposition. This is perhaps attributable to the practice, which observers from this side of the Atlantic have noted, of counsel engaged in arguing a case, to agree on the law so far as possible, and thus to narrow the point at issue. The usefulness of these opinions as elucidations of underlying principles is evidenced by the use which our own courts are making of them, of which more will be said presently. A further recommendation of such of these opinions as appear in the Law Reports is the care with which they are reported. The judges are accustomed to revise the proofs of the reports of cases which have come before them, and the whole work is conducted under the able editorship of so eminent a jurist as Sir Frederick Pollock.

But the prime interest of the American lawyer desirous of knowing the practical value to himself of the modern English decisions is not so much in their manner of expression as in their weight as expositions of the common law. Now, without entering upon the discussion of the question mooted by writers on jurisprudence, whether the common law is created by judicial decisions or merely expounded or declared therein it suffices here to say that the courts of this country, following the lead of Blackstone and Hale, are committed to the

[4] The judicial functions of the House of Lords are exercised by the lords of appeal, who are the lord chancellor of England for the time being, the lords of appeal in ordinary, appointed by patent, and who must either have held high judicial office for two years, or have been for at least fifteen years practising barristers in England or Ireland, or practising advocates in Scotland, and such peers of parliament as have been lord chancellors, paid members of the judicial committee of the privy council, or judges of the supreme court of England or of Ireland, or of the court of session of Scotland.

The judicial committee of the privy council consists of the president of the council, the lord keeper or first lord commissioner of the great seal of England, and all privy councilors who have held this office, or hold or have held high judicial office; that is to say, who have been lords of appeal in ordinary, judges of the supreme courts of England or Ireland, or of the court of session in Scotland, or who have been judges of the various superior courts in other parts of the British Empire.

The court of appeal consists of the lord chancellor, the lord chief justice of England, the master of the rolls, the president of the probate, divorce, and admiralty division, *ex officio*, and five lords justice of appeal, who must have been barristers of at least fifteen years' standing, or judges of the high court for not less than a year. Only barristers of at least ten years' standing are eligible to judgeships in the high court of justice.

theory that the common law is declared, and not made, by the courts.

Of the adoption of this theory by the American courts, we have room for but a few instances. Thus, we find the supreme court of Nebraska [7] saying: "The theory of our system is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require." So, also, the court of appeals of Maryland: [8] "It is contended that if our ancestors brought with them the common law of the mother country, or any part of it, it was the common law so far only as it had been established by judicial precedents at the time of their emigration, and not as it has since been expanded in England by judicial decisions. That our ancestors did bring with them the laws of the mother country, so far at least as they were applicable to their situation and the condition of an infant colony, cannot be seriously questioned. . . . If, then, they did bring with them the common law of conspiracy, which is assumed as undeniable (though it may have existed potentially only), they brought it as it is now settled and known in England; for what it is now, it was then, if any reliance can be had on ancient authorities; and it is to judicial decisions that we are to look, not for the common law itself, which is nowhere to be found, but for the evidences of it. . . . Precedents, therefore, do not constitute the common law, but serve only to illustrate principles." [9]

The important consequence of this theory is that our courts have felt at liberty to examine English decisions subsequent to the settlement of this country or to the Revolution, for the purpose of determining the common law as it always existed, and therefore as it has become the fundamental law of this country. Thus, in the Maryland case [8] just cited, the statement is made that decisions subsequent to the colonization of Maryland must be received as expositions of the common law as it before existed, and not as creating a new law or altering the old one. "It is a mistake to suppose that they are expansions of the common law, which is a system of principles not capable of expansion, but always existing, and touching whatever particular matter or circumstances may arise and come within the one or the other of them. . . . And if there were no other adjudications on the subject to be found, the judicial decisions since the colonization furnish conclusive evidence, not only of what is now understood to be the law of conspiracy in England, so far as those decisions go, but of what were always the principles on which that law rests." Again, in California, the supreme court of that state has said,[10] speaking of a statute making the common law of England the rule of decision in all courts of the state: "The statute adopts the common law of England, except where inconsistent with the Constitution and statutes, and there can be no good reason why, to ascertain the common law of England, we should not refer to the decisions of English and American courts (in states where the common law prevails) rendered before and subsequent to the date of the statute." So, also, in the Nebraska case [7] already mentioned, the court said of a similar statute that it "does not require adherence to the decisions of English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either of England or America, better expositions of the general principles of that system." Let us take one more instance, this time from Colorado: [11] "The common law thus being a constant growth, gradually expanding and adapting itself to the

[7] Williams v. Miles, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 A. & E. Ann. Cas. 306, 62 L.R.A. 383.

[8] State v. Buchanan, 5 Harr. & J. 317, 9 Am. Dec. 534.

[9] Perhaps the current doctrine that a change in judicial decision does not impair contract obligations is another instance in which this theory has been acted upon by the courts. For cases on the question, see notes in 5 L.R.A.(N.S.) 860, and 23 L.R.A.(N.S.) 500.

[10] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

[11] Chilcott v. Hart, 23 Colo. 40, 45 Pac. 391, 35 L.R.A. 41.

changing conditions of life and business from time to time, what the law is at any particular time must be determined from the latest decisions of the courts; and the recognized theory is that, aside from the influence of statutory enactments, the latest judicial announcement of the courts is merely declaratory of what the law is and always has been. We are at liberty therefore, if not absolutely bound thereby, to avail ourselves of the latest expression of the English courts upon any particular branch of the law, in so far as the same is applicable to our institutions, of a general nature, and suitable to the genius of our people, as well as to consult the English decisions made prior to 1607."

Since modern English law is a product of the reaction upon previously existing principles, of conditions and ideas which those prevailing in the United States closely approximate,—or, to put it in another way, since the English courts, as well as our own, are engaged in adapting and applying the same fundamental principles to modern conditions,—the practical value of their conclusions in aiding our solution of kindred problems becomes readily apparent. But, perhaps, their greatest service is as a corrective to the tendency of our courts, to which Professor Pound has recently called attention,[12] to regard the conceptions of classical English case law as fundamental conceptions of legal science.

A matter has already been touched in passing, which is of some weight in appraising the value, on this side of the Atlantic, of modern English case law. This is the similarity of the conditions, both material and intellectual, with which the courts of both countries have to deal. We cannot but have much in common with the nation from which we have derived our language and our law, and from which the founders of our institutions came. Modern world commerce and interchange of ideas have given both nations industrial, commercial, and social conditions which, with the development of this country, tend constantly to become more and more alike. The extent to which the English courts are occupied with the same questions as are being presented in our courts can be appreciated only after an examination of their decisions. A very imperfect comparison of the decisions in the Law Reports from 1901-1908 (inclusive), with the decisions of the American courts reported in the Lawyers' Reports Annotated, New Series, has brought to hand a considerable list of parallel cases, only a portion of which can here be given by way of demonstration of the striking similarity in the conditions existing in the two countries.[13]

Still another way in which modern English decisions may prove useful to the American lawyer is by interpreting statute law from which we have had occasion to borrow. Our statutes giving a right of action for wrongfully causing death are, as is well known, based upon the English statute known as Lord Campbell's act, differing therefrom only in matters of detail. Several states, and some of the Canadian provinces, have statutes modeled upon the English employer's liability act of 1880, which still continues in existence in England side by side with the more radical workmen's compensation legislation, which we are just beginning to imitate. Our in-

[12] "With us the basis of all deduction is the classical common law,—the English decisions and authorities of the seventeenth, eighteenth, and first half of the nineteenth centuries. Our jurists have made of this a very *Naturrecht*. They have asked us to test all new situations and new doctrines by it. Indeed, many of our courts have gone out of their way to construe statutes by it, and Mr. Carter tells us that it is a wise doctrine to presume that legislators intend no innovations upon this common law, and to assume, so far as possible, that statutes were meant to declare and reassert its principles. More than this, through the power of courts over unconstitutional legislation and the doctrine that our Bills of Right are declaratory, courts have forced it upon modern social legislation. Thus, the leading conceptions of our traditional case law come to be regarded as fundamental conceptions of legal science, and not merely the jurist, but the legislator, the sociologist, the criminologist, the labor leader, and even, as in the case of our corporation law, the business man, must reckon with them."—The Scope and Purpose of Sociological Jurisprudence, 24 Harvard L. Rev. 591.

[13] The courts in both countries have within the past ten years dealt, sometimes simultaneously, with the questions:

—when a negotiable instrument is deemed payable to the order of a fictitious person,

heritance tax laws are still another instance. The uniform negotiable instruments law, now in force in thirty-seven states and territories and the District of Columbia, is based upon the English bills of exchange act. The Harter act, relating to the obligations and duties of carriers of freight by sea, was the result of a movement on the part of leading commercial associations in both countries, to secure in each a needed amendment of the maritime law. The English bills of lading act has its counterpart in the statutes of some of the

---

within the rule which regards such an instrument as payable to bearer. Macbeth v. North & S. W. Bank [1908] A. C. 137; Seaboard Nat. Bank v. Bank of America, 193 N. Y. 26, 22 L.R.A.(N.S.) 499;

—the right to damages for injuries caused by fright. Dulieu v. White [1901] 2 K. B. 669; Huston v. Freemansburg, 212 Pa. 548, 3 L.R.A.(N.S.) 49; Chittick v. Philadelphia Rapid Transit Co. 224 Pa. 13, 22 L.R.A.(N.S.) 1073; Pankopf v. Hinkley, 141 Wis. 146, 24 L.R.A.(N.S.) 1159;

—the delegability of an employer's duty to instruct or warn his employees. Young v. Hoffmann Mfg. Co. [1907] 2 K. B. 646; Cribb v. Kynoch [1907] 2 K. B. 548; Anderson v. Pittsburgh Coal Co. 108 Minn. 455, 26 L.R.A. (N.S.) 624;

—the validity of an agreement to maintain selling prices. Elliman Sons & Co. v. Carrington & Son [1901] 2 Ch. 275; Grogan v. Chaffee, 156 Cal. 611, 27 L.R.A.(N.S.) 395;

—the right to recover funeral expenses of persons negligently killed. Clark v. London General Omnibus Co. [1906] 2 K. B. 648; Philby v. Northern P. R. Co. 46 Wash. 173, 9 L.R.A.(N.S.) 1193;

—liability for interference with contract relations. South Wales Miners' Federation v. Glamorgan Coal Co. [1905] A. C. 239, 1 B. R. C. 1; Knickerbocker Ice Co. v. Gardiner Dairy Co. 107 Md. 556, 16 L.R.A.(N.S.) 746;

—the right of a labor union to divert trade from one with whom it is in controversy. Quinn v. Leathem [1901] A. C. 495, 1 B. R. C. 197; Purvis v. Local No. 500, U. B. C. & J. 214 Pa. 348, 12 L.R.A.(N.S.) 642; Wilson v. Hey, 232 Ill. 389, 16 L.R.A.(N.S.) 85;

—the liability of a trade union to persons with whose employment it has interfered. Read v. Friendly Soc. [1902] 2 K. B. 732, 1 B. R. C. 503; Giblan v. National Amalgamated Laborers' Union [1903] 2 K. B. 600, 1 B. R. C. 528; Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899;

—whether a right of action for wrongful seizure of goods is an assent which passes to a trustee in bankruptcy. Rose v. Buckett [1901] 2 K. B. 449; Hansen Mercantile Co. v. Wyman, P. & Co. 105 Minn. 491, 21 L.R.A. (N.S.) 727;

—whether restitution to a *cestui que trust* is a fraudulent preference. Re Lake, [1901] 1 K. B. 710; Atherton v. Green, 103 C. C. A. 298, 30 L.R.A.(N.S.) 1053;

—the duty of a bank depositor with respect to checks forged by a servant to whom he intrusts the keeping of his bank account. Kepitigalla Rubber Estates v. National Bank [1909] 2 K. B. 1010; First Nat. Bank v. Richmond Electric Co. 106 Va. 347, 7 L.R.A. (N.S.) 744;

—the right of a passenger carrier to stipulate against liability in consideration of a reduced fare. Clarke v. West Ham Corp. [1909] 2 K. B. 858; Pittsburgh, C. C. & St. L. R. Co. v. Higgs, 165 Ind. 694, 4 L.R.A. (N.S.) 1081;

—whether entering the employ of another constitutes a breach of a covenant not to become interested in a similar business. Gophir Diamond Co. v. Wood [1902] 1 Ch. 950; Siegel v. Marcus, 18 N. D. 214, 20 L.R.A. (N.S.) 769;

—liability for injury inflicted by an animal known to be dangerous, in the absence of negligence in restraining it. Baker v. Snell [1908] 2 K. B. 824; Harris v. Carstens Packing Co. 43 Wash. 647, 6 L.R.A.(N.S.) 1164;

—whether an accident insurance policy covers sickness or death caused by blood poisoning. Mardorf v. Accident Ins. Co. [1903] 1 K. B. 584; Cary v. Preferred Acci. Ins. Co. 127 Wis. 67, 5 L.R.A.(N.S.) 926;

—liability of a landlord to the tenant of a flat for disrepair of portions of the building remaining in his control. Hargroves v. Hartopp [1905] 1 K. B. 472; Miles v. Tracey, 28 Ky. L. Rep. 621, 4 L.R.A.(N.S.) 1142;

—who is responsible for the acts of a driver furnished with a hired vehicle. Waldock v. Winfield [1901] 2 K. B. 596; Frerker v. Nicholson, 41 Colo. 12, 13 L.R.A.(N.S.) 1122;

—the validity of an agreement by an employee not to enter into competition with his employer. Henry Leetham & Sons v. Johnstone-White [1907] 1 Ch. 322; Turner v. Abbott, 116 Tenn. 718, 6 L.R.A.(N.S.) 892;

—the duty of the vendor of dangerous goods to warn the purchaser thereof. Clarke v. Army & Navy Co-op. Soc. [1903] 1 K. B. 155; Clement v. Rommeck, 149 Mich. 595, 13 L.R.A.(N.S.) 382;

—the right of a railroad company as a riparian owner to take water for its engines. McCartney v. Londonderry & L. S. R. Co. [1904] A. C. 301; Harris v. Norfolk & W. R. Co. 153 N. C. 542, 31 L.R.A.(N.S.) 543;

—the effect of a statement made by an auctioneer upon the rights of a purchaser who did not hear it. Re Hare [1901] 1 Ch. 93; Kennell v. Boyer, 144 Iowa, 303, 24 L.R.A. (N.S.) 488;

—whether the special value of property for purposes for which it is taken is an element of compensation in condemnation proceedings. Lucas v. Chesterfield Gas & Water Bd. [1909] 1 K. B. 16; Sargent v. Merrimac, 196 Mass. 171, 11 L.R.A.(N.S.) 996;

—drunkenness as a defense to a prosecution

states; and, as the Supreme court has had occasion to point out,[14] the second and third clauses of our interstate commerce act are modeled upon English legislation. Doubtless these instances might be multiplied. In accordance with a familiar principle of statutory interpretation, the settled meaning of this borrowed legislation at the time of its adoption applies in its construction; while subsequent interpretations by the English courts are of at least persuasive force.

Still another element of value in modern English law is the aid it affords in the solution of questions the determination of which rests ultimately upon considerations of public welfare, such as the validity of an agreement to maintain selling prices;[15] or of a restrictive condition as to the use of leased machinery;[16] or of an employee's covenant not to engage in a competing business;[17] or questions growing out of labor movements, such as strikes and boycotts.[18]

An examination of the practical value of modern English decisions to the American lawyer would not be complete without some investigation of their actual use by the courts of this country. Taking the phrase "modern English decisions" to signify only those decided less than twenty years ago, it appears that of those decided between 1891 and 1907

for homicide. Rex v. Meade [1909] 1 K. B. 895; State v. Kidwell, 62 W. Va. 466, 13 L.R.A.(N.S.) 1024;

—whether money in the hands of a public officer is subject to garnishment. Spence v. Coleman [1901] 2 K. B. 199; Boylan v. Hines, 62 W. Va. 486, 13 L.R.A.(N.S.) 757; Cowart v. W. E. Caldwell Co. 134 Ga. 544, 30 L.R.A.(N.S.) 720;

—whether a slot machine is within a statute against gambling. Fielding v. Turner [1903] 1 K. B. 867; Territory v. Jones, 14 N. M. 579, 20 L.R.A.(N.S.) 239;

—the law governing the validity of a marriage. Ogden v. Ogden [1908] P. 46; Gabisso's Succession, 119 La. 704, 11 L.R.A.(N.S.) 1082; State v. Fenn, 47 Wash. 561, 17 L.R.A.(N.S.) 800; State v. Hand, 87 Neb. 189, 28 L.R.A.(N.S.) 753;

—as to when noise incidental to manufacturing operations constitutes a nuisance. Rushmer v. Polsue [1906] 1 Ch. 234; LeBlanc v. Orleans Ice Mfg. Co. 121 La. 249, 17 L.R.A.(N.S.) 287;

—as to whether a contagious disease hospital constitutes a nuisance. Atty. Gen. v. Nottingham [1904] 1 Ch. 673; Barry v. Smith, 191 Mass. 78, 5 L.R.A.(N.S.) 1028; Hessin v. Manhattan, 81 Kan. 153, 25 L.R.A.(N.S.) 228;

—the liability of a railroad for injuries sustained by a child while playing on a turntable. Cooke v. Midland G. W. R. Co. [1909] A. C. 229; Walker v. Potomac, F. & P. R. Co. 105 Va. 226, 4 L.R.A.(N.S.) 80; Conrad v. Baltimore & O. R. Co. 64 W. Va. 176, 16 L.R.A.(N.S.) 1129;

—the limitation of the right to use one's own name as a tradename. Fine Cotton Spinners' & D. Asso. v. Harwood, C. & Co. [1907] 2 Ch. 184; Morton v. Morton, 148 Cal. 142, 1 L.R.A.(N.S.) 660; Ætna Mill & Elevator Co. v. Kramer Mill, Co. 82 Kan. 679, 28 L.R.A.(N.S.) 934;

—the right of a purchaser of land to a lien for the sum paid by him, where the contract is rescinded. Whitebread & Co. v. Watt [1902] 1 Ch. 835; Davis v. William Rosenzweig Realty Operating Co. 192 N. Y. 128, 20 L.R.A.(N.S.) 175;

—the right of the public to bathe on the seashore. Brinckman v. Matley [1904] 2 Ch. 313; Butler v. Atty. Gen. 195 Mass. 79, 8 L.R.A.(N.S.) 1047;

—the validity of a gift for such charitable or public purposes as the trustee may deem proper. Blair v. Duncan [1902] A. C. 37; Dulles's Estate, 218 Pa. 162, 12 L.R.A.(N.S.) 1177;

—the revocability of a mutual will. Stone v. Hoskins [1905] P. 194; Frazier v. Patterson, 243 Ill. 80, 27 L.R.A.(N.S.) 508;

—whether a legacy of shares of stock is adeemded by the substitution of other shares therefor in the testator's lifetime. Re Slater [1907] 1 Ch. 665; Snyder's Estate, 217 Pa. 71, 11 L.R.A.(N.S.) 49;

—as to whether a woman becoming the second wife of a person subsequently to testator's decease may have the benefit of a testamentary provision for the wife of such person. Re Coley [1903] 2 Ch. 102; Meeker v. Draffen, 201 N. Y. 205, 33 L.R.A.(N.S.) 816.

[14] Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 222, 40 L. ed. 948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 253, 55 L. ed. 457, 31 Sup. Ct. Rep. 392.

[15] Elliman Sons & Co. v. Carrington & Son [1901] 2 Ch. 275.

[16] United Shoe Machinery Co. v. Brunet [1909] A. C. 330.

[17] Henry Leetham & Sons v. Johnstone-White [1907] 1 Ch. 322.

[18] J. Lyons & Sons v. Wilkins [1899] 1 Ch. 255; Quinn v. Leatham [1901] A. C. 495, 1 B. R. C. 197; Read v. Friendly Soc. [1902] 2 K. B. 732, 1 B. R. C. 503; Giblan v. National Amalgamated Laborers' Union [1903] 2 K. B. 600, 1 B. R. C. 528; South Wales Miners' Federation v. Glamorgan Coal Co. [1905] A. C. 239, 1 B. R. C. 1.

no less than five hundred and seventy-one have been cited by our courts; that these cases have been cited nearly twelve hundred times; and by the courts of forty-four states and territories (including the District of Columbia), as well as by the Federal courts. Pursuing this line of inquiry a little further, it appears that these decisions are most copiously cited in jurisdictions whose decisions are received with great respect, such as Massachusetts, New York, and New Jersey, and in the United States Supreme Court and the subordinate Federal courts.

An analysis of the citations of the English cases for a single year, taken at random, shows them to have been cited some one hundred and fifty times, and upon such diverse subjects as aliens, bankruptcy, bills and notes, collision, conflict of laws, contracts, copyright, criminal law, death, executors and administrators, fisheries, fraud, injunctions, insurance, landlord and tenant, libel, life tenants and remaindermen, limitation of actions, malicious prosecution, marine insurance, master and servant, mortgage, novation, parent and child, partnership, perpetuities, practice, principal and agent, principal and surety, shipping, tradenames, torrens system, wharves, waters and wills.

But of still more importance than the number of times these modern English decisions have been cited is the attitude of the courts toward them. Again taking at random the English decisions of a single year, 1891, let us consider the evidence of some of the citing courts. One case [19] is variously characterized as "a carefully considered decision," in which the view taken by the citing court "finds strong support;" as containing "extremely interesting" opinions; and as "a leading authority on the subject." Another [20] is alluded to as "the most instructive case upon this subject." Still another [21] is characterized as "a case that received very thorough consideration;" as a "leading case" in which "the whole subject and the relevant decisions are elaborately considered;" as "among the best authorities;" and as among "the more recent and better considered cases." Another [22] is cited as fairly summarizing the conclusions of the courts on the subject; and as containing an admirable expression of the applicable rule. One citing court finds in the dissenting opinion rendered in an English case,[23] the ground on which it bases a different conclusion upon the same point. Another English case [24] is cited as stating the true rule of construction of the cesser clause in a charter party, with the reasons supporting it. Of another,[25] the citing court says: "The opinions in this case contain the fullest and most satisfactory discussion to be found in the books relative to the questions now under consideration." Another [26] the citing court calls a "thoroughly considered case," which it is sufficient to cite without going into the authorities.

This, then, is the practical value of modern English case law to the American lawyer, that it furnishes him with an interpretation of the common law in the light of modern conditions, to which his courts lend an attentive ear; that it points the way to the solution of the novel questions that are the outcome of these conditions; that it is constantly dealing with the same questions, as are arising in his own courts; that it aids in, and sometimes controls, the construction to be placed upon borrowed legislation; and last, but not least, more than giving him mere decisions, it helps him to attain that wider horizon and comprehensive grasp of principle which distinguishes the well-equipped lawyer from the shallow empiricist. In these modern decisions is to be found the new and still vital growth of that law which is "common law" not only in a technical sense but in the fuller sense of being the common heritage of the English-speaking world.

---

[19] Bank of England v. Vagliano Bros [1891] A. C. 107, cited in Central Nat. Bank v. National Metropolitan Bank, 31 App. D. C. 405, 17 L.R.A.(N.S.) 526; National Dredging Co. v. Farmers' Bank, 6 Penn. (Del.) 602, 16 L.R.A.(N.S.) 602; and in Trust Co. of America v. Hamilton Bank, 127 App. Div. 518, 112 N. Y. Supp. 86.

[20] Montgomery v. Thompson [1891] A. C. 217, cited in Shaver v. Heller & M. Co. 48 C. C. A. 54, 108 Fed. 827, 65 L.R.A.883.

[21] Smith v. Baker [1891] A. C. 325, cited in Schroeder v. Chicago & A. R. Co. 108 Mo. 328, 18 L.R.A.830; Atlas v. National Biscuit Co. 100 Minn. 32; Dean v. St. Louis Wooden Wareworks, 106 Mo. App. 180; and Pressly v. Dover Yarn Mills, 138 N. C. 417.

[22] Johnson v. Lindsay [1891] A. C. 371, cited in Kelly v. Tyra, 103 Minn. 178, 17 L.R.A.(N.S.) 340 and Delaware, L. & W. R. Co. v. Hardy, 59 N. J. L. 38.

[23] M'Cowan v. Baine [1891] A. C. 401 cited in Western Transit Co. v. Brown, 88 C. C. A. 617, 161 Fed. 869.

[24] Clink v. Radford [1891] 1 Q. B. 625, cited in Crossman v. Burrill, 179 U. S. 107, 45 L. ed. 110.

[25] Joyner v. Weeks [1891] 2 Q. B. 31, cited in Appleton v. Marx, 191 N. Y. 85, 16 L.R.A. (N.S.) 213.

[26] Aas v. Benham [1891] 2 Ch. 244; cited in Latta v. Kilbourn, 150 U. S. 549, 37 L. ed. 1178.

The Continuity of Case Law

BY M. C. KLINGELSMITH

HE virtue of the common law lies in its oneness with the common life. Beyond all other systems of law it has the virtue of being bone of the people's bone, flesh of their flesh. As the civilization of to-day has grown out of the civilization of those centuries in which the cases reported in the Year Books were decided, so the law of to-day has grown out of the law of that day. There has been no break in the steady line from one to the other. In those centuries covered by the decisions of the Year Books, the English were building up a people,—a people which should become a dominant people, who should greatly change the face of the earth. Gradually they were producing yet another race who would not be content with the limitations, physical or mental, of the British Isles, and out of whose dissatisfaction with those limitations should come new peoples who would inaugurate a new civilization, and administer under new conditions that old law in which they had been trained, and which they were to develop. But as there was no break in the continuity of the civilization, so there was no break in the continuity of the law. To-day the voices of those old judges speak to us from the most modern of tribunals, and the principles which they then enunciated are the principles upon which we base the reasoning of our courts. They are immutable principles in many cases certainly, always new, yet always old; but somewhere there must originate a certain accepted statement of such opinions; somewhere there must be shaped the first formula which is to guide the future action; and in our law these statements were first made, and these formulas first set forth, in those books which we call the Year Books. . . .

Should the point to be argued be a delicate one, can there be any doubt that the man who is familiar with the subtleties of those old debaters; who knows how the points were argued then; how they were settled and unsettled, and finally got shaped into that which is now the accepted law,—will best be able to overrule the arguments, to distinguish the differences, to challenge the statements, which may be made in the course of the litigation? Which will win? The man with only a superficial knowledge, going only half way back, or the man with the knowledge that is thoroughly grounded in the sources of the law? But it will be said that the chances are that neither will ever have gone so far back, and thus one will be as well weaponed as the other. The man who fights chance fights odds few lawyers have a right to take; and men have taken such chances and failed. Have we not the well-known Girard will case to prove that the man who takes it for granted that he will not have an opponent learned in the older law has thrown away the chances of his client in a blind reliance upon the ignorance of that opponent? At any time in any case, the same thing may happen, and it is increasingly more probable with every advance of knowledge, with every passing year, that brings new students into the field. . . . .

The common lawyer may not know a word of Old French; he may never have opened a Year Book; he may not be able to trace a citation through the mazes of an old abridgment; he may not care for the old law, but may care only for "the practical side" of the law, as he calls it, and the latest decision fresh from the judicial pen. Not the less is he dependent upon the older law. He can no more get away from it than he can get away from past history, past development in all the other surroundings and conditions of his life. When he goes into court and talks about an assumpsit, he speaks as the men of old spoke. What is an action but the thing they shaped? Where are the roots of those doctrines he—glibly or painfully as it may be—

recites before the court? Why does the court support or refuse his presentation of them? The court has to know if he does not, or if—supposing the impossible—the court does not know, it must borrow the knowledge somewhere. . . .

But we must not only go to the foundation, we must be sure that our foundation is as broad as it should be, and that the stones are all in place. In the older abridgments, in Statham and Fitzherbert, we find many citations to Year Books which have never as yet been printed, which still remain buried awaiting their resurrection through the printer's art. The cases in them are of the same authority as those upon which we have for so long been founding our law, and the older writers had access to them in their manuscript form. It seems a disgrace that there can still remain unprinted, practically inaccessible, sources of the law so valuable, so apparently priceless, that it would seem that they would have found their place in the world of learning many and many a year ago. And more than this, the edition of the Year Books from which most of us have to obtain what knowledge we have of them is an edition which has never been collated and corrected by comparison with the manuscripts, which are so abundant, and which would afford a means by which we could complete, correct, and clarify these old editions of ours; these most important, most fundamental portions of our case law.

The thoughtful lawyer, the skilful practitioner, the student of the law, all need, and should demand, that in this latter day, this day of discovery and enterprise and initiative in all other things, they should have set before them not only a new edition of the already printed Year Books, but that all the unprinted Year Books should be given to them, in some such form as that in which Mr. Maitland gave to the world his translation of that portion of the Maynard, or oldest of the Year Books, which he was able to complete before his death. Or if not in so ideal a manner, yet in some correct and complete form, they should be given to the world; the world which never at any time has too much knowledge, and which cannot afford to forego the benefit which would come to it from such a source.

It is not because the letter of the law stands written out in these old books that they alone are valuable. Not too much stress must be placed on authority. The dead hand of the past must not be laid too heavily upon the quick brain of the living present, to chill it into inactivity. But the vivid life of to-day must send its roots down into the depth of the past to draw thence the strength and the vigor which shall give it, not the frail and freakish beauty of the air plant, but the splendid strength of the oak and the magnificent virility of the poplar, which towers above its fellows of the forest, stronger, straighter, than them all, yet bearing upon its branches the most delicate, the most exquisite, of flowers. So should the modern tree of legal learning be. A giant with roots grasping firmly the good earth from which it grows, with branches gaining from every source of sun and air a liberal life, and in their midst the flowering of that pleasant wisdom which, while it is the chief adornment of the tree, is also the seed vessel from which shall spring the yet grander tree of future times.—Reprinted by permission of the University of Pennsylvania Law Review.

Democracy and the Common Law

BY ROSCOE POUND

Professor in the Law School of Harvard University

O institution of the modern world shows such vitality and tenacity as our Anglo-American legal system which we call the common law. Essentially a mode of legal and juristic thinking rather than a fixed body of definite rules, it succeeds everywhere in molding rules, whatever their origin, into accord with its principles, and in maintaining those principles in the face of formidable attempts to overthrow or supersede them. In the United States, it survives the huge mass of legislation that is annually placed upon our statute books, and gives to it form and consistency. It has imposed itself upon a French Code in Louisiana, and is fast doing the like in Quebec. In everything but terminology, it has all but overcome a received Roman law in Scotland. Roman-Dutch law in South Africa is slowly giving way before it, as the judges more and more reason in a Romanized terminology after the fashion of common-law lawyers. In the Philippines and in Porto Rico, there are many signs that common-law administration of a Roman Code will result in a system English in substance, if Roman-Spanish in its terms. For the strength of the common law is in its treatment of concrete controversies, as the strength of the civil law is in its logical development of abstract conceptions. Hence, wherever the administration of justice is mediately or immediately in the hands of common-law judges, their habit of applying to the cause in hand the judicial experience of the past, rather than attempting to fit the cause into its exact logical pigeon hole in the abstract system, gradually undermines the competing body of law, and makes for a slow but persistent invasion of the common law. At but one point has the common law met with defeat in its competition with rival systems in the modern world. The contest of French law, English law, and German law, in the framing of the new Codes for Japan, was won decisively by the latter. And yet this was not a contest of English and German law. It was a competition between systems of legal rules, not between modes of judicial administration of justice. In a comparison of abstract systems, the common law is at its worst. In a test of the actual handling of single controversies, it has always prevailed. Professor Kohler of Berlin, unquestionably the first of living jurists, says of common-law countries: "Their science does not go beyond the most scanty beginnings, but their administration of justice greatly surpasses ours." [1]

Supremacy of Law by Judicial Power.

Nor is this all; the American development of the common-law doctrine of supremacy of law in our judicial power over unconstitutional legislation is commending itself to peoples who have adopted written Federal Constitutions. Not only do we meet with judicial discussions of constitutional problems, fortified with discussion of American authorities, in the reports of South American republics,[2] but the Australian bench and bar, notwithstanding a decision of the Judicial Committee of the privy council in England to the contrary, are insisting upon the authority of Australian courts to pass upon the constitutionality of state statutes. Moreover, if, in the eighteenth century, while the absorption of the law merchant was in progress, Anglo-American law received indirectly not a little of the civil law through the continental treatises on commercial law, which exercised so wide an influence at that time, in the nineteenth century we were well avenged. In the more recent development of the subject, the law evolved in the English courts has played a leading part, and continental jurists do not hesitate to admit that in this way English law has been received into their legal systems.[3]

Vitality of Common Law of Torts.

The most striking example of the vitality of the common law is to be seen in our law of torts. The genius of the Roman jurists expended itself upon what may be called in a wide sense the law of contractual obligations, —that portion of the law that has to do with recognizing and giving effect to the intention of the parties to legal transactions to create rights and duties, that has to do with the intention implicit in such transactions and the rights and duties annexed by law to the relations to which they give rise. Here the Romans were at their best. Sohm says truly: "As to the remaining parts of Roman private law, they never again attained to complete and absolute dominion, and are all on the point of being more or less superseded. . . . But the Roman law of obligations

1 Geleitwort to Rogge's Methodologische Vorstudien zu einer Kritik des Rechts, p. iii. (1911).

2 Art. 100, of the Constitution of Argentina clearly invites this.

3 Endemaran, **Lehrbuch des bürgerlichen Rechts, I,** § 1.

will endure. It cannot be abolished. . . . The legislation of Germany may indeed repeal the Roman law on this subject; in point of fact, however, it cannot fail to be a substantial re-enactment of it."[4] On the other hand, the Roman law of delict was governed to the end by archaic conceptions. The Roman spoke of obligations *ex delicto*, because he started with the archaic notion of a penalty or composition owed by the wrongdoer to the person injured, and hence assimilated the debt due *ex delicto* to the duty due *ex contractu*. But there is a fundamental difference between that body of law which secures interests of personality or of substance from violation by acts which create responsibility for their consequences and are held wrongful, and that body of law securing interests of substance only, which defines the efficacy and the consequences of acts, rightful in every way, done for the purpose of altering the spheres of rights of the parties thereto. The common law felt this difference, and applied itself from the beginning to torts, as the Roman law applied itself to contracts. In consequence, our Anglo-American law of torts seems destined to stand in universal legal history along with the Roman law of contracts, as an enduring contribution. Wherever in the modern world the common law and the civil law have come in contact in the same jurisdiction, as in Scotland, Louisiana, Canada, and South Africa, the common law of torts has been quietly but thoroughly received.

An Impending Crisis.

Superficially, the triumph of the common law, and its establishment as a law of the world by the side of the Roman law, seem secure, and yet at the very moment of triumph it is evident that a crisis is at hand. If not actually upon trial in America, the common law is certainly under indictment. To take the three examples of its world-wide extension noted above, its doctrine of supremacy of law and consequent judicial power over unconstitutional legislation is bitterly attacked in the land of its origin, and is endangering the independence and authority of the courts, which is the central point of a common-law system; its commercial law is codifying in England and in America; and in its law of torts the sentence of death which hangs over the fellow-servant rule, assumption of risk, and contributory negligence, so far at least as applied to employees in large industrial enterprises, appears to involve the fundamental principles of the whole system.

Such a crisis is not at all unique in the history of our legal system. In the past the common law has contended with more than one powerful antagonist, and has come forth victor. In the twelfth century it strove for jurisdiction with the church, the strongest force of that time. In the sixteenth century, when the Roman law was sweeping over Europe and superseding the endemic law on every hand, the common law stood firm. If, as some contend, the rise of the court of chancery and development of equity was in some measure a Romanizing movement, yet the common law soon impressed itself thoroughly upon the intruding element, and molded it into a part of our general system. In the seventeenth century it contended with the English Crown, and established against the Stuart Kings its doctrine of the supremacy of law. In America, after the Revolution, it prevailed over the prejudice against all things English, that for a time threatened a reception of French law, developed the doctrine of supremacy of law to its ultimate logical conclusion in the teeth of the strongest political influence of the time, and maintained its doctrine of precedent, involving the unpopular practice of citing English decisions, in spite of the hostility to lawyers and to systematic legal administration of justice characteristic of new communities. The common law passed through each of these crises with its distinctive fundamental ideas not merely unshaken, but more firmly settled. Hence we may look forward to a new crisis with confidence. And yet does it not behoove those to whom this traditional system of administering justice has been committed, to inquire what is the nature of the present crisis, to ask what brings it about, to consider how they shall meet it?

Distinctive Characteristics of the Common Law.

To answer the foregoing questions, we must first ask, What are the distinctive and fundamental characteristics of the common law? To my mind, they are three: (1) The doctrine of precedents, (2) trial by jury, and (3) the supremacy of law. But if we look at these more narrowly, we see that they have a common element. The first means that causes are to be judged by principles reached inductively from the judicial experience of the past, not by deduction from rules established by the sovereign will. In other words, reason, not arbitrary will, is to be the ultimate ground of decision. The second arose as a rational mode of trying issues of fact. We must remember that trial by jury was the first rational, as distinguished from mechanical, mode of trial to develop in modern Europe. With all the crudities that remain attached to it in this country, or that the perverse ingenuity of American lawyers and legislators has been able to add to it, the trial *viva voce* in open court, by examination and cross-examination of witnesses by counsel for the respective parties, which the common law developed out of the exigencies of jury trial, is the most effective machinery for getting at the truth which has yet been devised. It is this rational mode of trial which is a really distinctive feature of the common law. Hence we go counter to its whole spirit when, as in so many American states, we make of jury trial an emotional or irrational pro-

4 Institutes of Roman Law, transl. by Ledlie (L. ed.), § 15.

ceeding, by removing all checks and inviting the jury to make and administer a rule for the case before them at their will. Trial by jury, as an institution of the common law, means trial by a jury suitably checked and suitably advised, not the ascertainment of the arbitrary will of twelve representatives of the supposed arbitrary will of the community. Even more is the third characteristic, the supremacy of law, reducible to the same idea. It is a doctrine that the Sovereign and all his agencies are bound to act upon principles, not according to arbitrary will; are obliged to conform to reason, instead of being free to follow caprice. Coke said with justice: "For reason is the life of the law, nay, the common law itself is nothing else but reason."

Let us look at the foregoing characteristics of the common-law system, and ask ourselves what there is in them to bring the common law into conflict with the American democracy.

The Foundation of Law.

At the basis of the doctrine of judicial precedents is the idea that experience will afford the most satisfactory foundation for standards of action and principles of decision; the idea that law is not to be made arbitrarily by a fiat of the Sovereign will, but is to be discovered by judicial and juristic experience of the rules and principles which in the past have accomplished or failed to accomplish justice. In such a view, not merely the interpretation and application of legal rules, but in a large measure the ascertainment of them, must be left to the disciplined reason of the judges, and we must find our assurance that they will be governed by reason, and that the personal equation of the individual judge will be suppressed, in the criticism of the reported decision by bench and bar in the discussion of other causes. The vitality of the common law, and the steady increase in the value attributed to reported judicial decisions in the rest of the world, attest the soundness of this expectation. But the whole theory of law and of lawmaking which it involves runs counter to current political ideas.

The divergence between lawyer and layman to-day upon the questions what law is, and on what grounds law calls for obedience, results in part from the inherent opposition between reason and arbitrary will, which led to the conflict between the common law and the Stuart Kings, and of which I must speak more fully presently in another connection. But for the most part it results from the survival of eighteenth-century ideas in both legal and political thinking.

The Legal Theory.

Jurists of the eighteenth century believed that there were first principles of law inherent in nature, and that these principles were discoverable by deduction as necessary results of human nature. They conceived it to be their task to discover these principles, to deduce a system from them, and to test all actual legal rules by them. But, as has always been true when men have held absolute theories of this sort, the supposed principles flowed in practice from one of two sources. On social, economic, and ethical questions, nature was always found to dictate the personal views of the individual jurist as they had been fixed by education, class interest, and association with others of his class. On legal questions, nature was found to dictate for the most part the principles of law with which the individual jurist was familiar and under which he had grown up. Thus, for the continental jurist, natural law meant for the most part an ideal development of the principles of the Roman law, which he knew and studied; for the common-law lawyer, in the same way, it meant an ideal development of the principles of the common law. The past generation of lawyers, brought up on Blackstone, learned this mode of thinking as part of the rudiments of legal education. More recently, our historical legal scholarship, assuming that all of our legal system is at least implicit in the reports of the sixteenth and seventeenth centuries, if not in the Year Books, has given us a natural law upon historical premises. Hence scholar and lawyer concurred in what became a thorough going conviction of the nineteenth century lawyer, that at least the principal dogmas of the common law were of universal validity and were established by nature. When the lawyer spoke of law he thought of these doctrines. He conceived that Constitutions and Bills of Rights simply declared them. He construed statutes into accord with them. He forced them upon modern social legislation. When he reminded the sovereign people that it ruled under God and the law,[5] he meant that these doctrines, which he conceived of as going back of all Constitutions and beyond the reach of legislation, were to be the measure of state activity. This was not, indeed, the common law. The common law rested upon the idea that reason, not arbitrary will, should be the measure of action and of decision. But the eighteenth century was sure that it had the one key to reason, and was fond of laying out philosophical and political and legal charts by which men were to be guided for all time.

The Popular Theory.

While on the one side the legal theory had become absolute through the general adoption of the eighteenth-century conception, a political theory became established on the other side, which was no less absolute and which runs counter not only to the theory of immutable jural principles inherent in nature, which would be no great harm, but also to the whole common-law theory of precedent and of law making. For the popular theory of sovereignty, what one may call the classical American political theory, is quite as firmly rooted in the mind of the people as the eighteenth-cen-

5 "The King was greatly offended, and said that then he should be under the law, which was treason to affirm, as he said; to which I said that Bracton saith *quod Rex non debet esse sub homine, sed sub Deo et lege.*" Coke, in the case of Prohibitions del Roy, 12 Rep. 63.

tury theory of law is rooted in the mind of the lawyer. The layman is taught this political theory in school, he reads it in the newspapers, he listens to it on the Fourth of July and from Chautauqua platforms, and he seldom or never hears it questioned. In consequence, he is as thoroughly sure of it as is the lawyer of his juristic theory. If the lawyer is moved to stigmatize all that does not comport with his doctrine as lawlessness, the people at large are moved to stigmatize all that does not comport with their theory as usurpation.

While the lawyer, as a rule, still believes that the principles of law are absolute, eternal, and of universal validity, and the common law teaches that principles of decision must be found, not made, the people believe no less firmly that law may be made, and that they have the power to make it. While to the lawyer the state enforces law because it is law, to the people law is law because the state, reflecting their desires, has so willed. While to the lawyer law is above and beyond all will, to the people it is but a formulation of the general will. Hence it often happens that when the lawyer thinks he is enforcing the law, the people think he is overturning the law. While, for example, the lawyer thinks of popular action through the state as subject to legal limitations running back of all Constitutions, and merely reasserted, not created, thereby, the people think of themselves as the authors of all Constitutions and limitations, and the final judges of their meaning and effect. This conflict between the lawyer's theory, as he gets it from the eighteenth century, and the political theory, likewise of eighteenth-century origin, becomes most acute with respect to the common-law doctrine of supremacy of law. But it leads also to conflict over the relation of common law to legislation.

Conflicting Doctrines.

Since no amount of detailed rule-making in advance can provide a rule, much less a just rule, for every phase of the infinite variety of human action, the common law looks to judicial experience in the decision of causes as the main agency for discovering legal principles and formulating rules. Moreover, in a system of traditional principles developed by experience much depends upon general analogies and upon deduction from the rules which obtain upon subjects kindred to the one in hand. Thus, new rules cannot stand wholly by themselves. They must find a place in the whole legal system, they must be made to fit into that system, they must be made to harmonize therewith as much as possible. So far as friction between the popular will as expressed in statute, and judicial reason as employed in applying them, results from this, it is inevitable, and is but a phase of the conflict which the common law has always waged with arbitrary will. But the eighteenth-century theory of the finality of legal doctrines often leads the lawyer to pay scant attention to legislation, or to mold it and warp it to the exigencies of what he regards as the real law. To those who do not share, and do not understand, his theory, this appears as a high-handed over-riding of law, and the layman, laboring under that impression, is unable to perceive why the lawyer should have a monopoly of that convenient power. In other words, the popular theory comes in conflict but partially with the common law. In large part the opposition is directed to, and is justified by, an absolute theory of law which has no place in the thought of to-day. Yet there is a conflict between the common law and any theory which teaches that the words "Be it enacted" suffice to justify all that follows.

Throughout the Germanic law books of the Middle Ages, says Hensler,[6] runs the idea that law is a "quest of the creature for the justice and truth of his Creator." All notion of arbitrary will was foreign to it. The conception that the will of the Sovereign had the force of law came from Rome. Hence when Bracton announced that the King ruled under God and the law, he meant, in modern terms, that the state was bound to act justly and reasonably, and not wilfully and arbitrarily. Such is the doctrine which is intrenched in our legal system through Bills of Rights and the judicial power over unconstitutional legislation. As such, it is, as we have seen, a fundamental common-law doctrine. But it conflicts obviously with a doctrine of the absolute authority of the sovereign will; and if a people holds that the will of the majority for the time being is to be like the will of the Roman Emperor, a final source of rules and standards, the common-law doctrine may have to give way. It cannot be denied that much of the opposition to the judicial power over legislation proceeds upon this ground. To this extent the present agitation but reproduces the contest between the courts and the Crown in the seventeenth century. To this extent also, we may believe it will have the same outcome. For if legislation has sometimes fared hardly in American courts, the law has fared much more hardly in American legislatures. The assumption that the making of laws and the administration of justice are easy tasks to which everyone is competent is merely a popular phase of the complacent royal delusion of omniscience. James I. asked: "And have not I reason as well as my judges?" We do not hesitate to answer that he had not. Those who attack our courts for alleged perversions of the declared popular will are wont to say, when told that causes are to be decided by reason, "Whose reason?" If by this question they mean that the reason of the lawmaker may be made available in applying rules after they are made, and that application of legal rules is partly a mechanical function, we might say to them that France, Germany, and Austria, which have Codes, and in which the common-law doctrines of precedent have never obtained, are full of agitation for free interpretation, for "free finding of the law," and for equitable application of legal rules which seek the very result that is reached by judicial interpretation under the common law. If they conceive that legislator and court have only to

6 Institutionen des deutschen Privatrechts, § I.

discover the will of the people for the time being, and put it into chapters and sections, in order to produce law, we must answer as did Coke:

"To which it was answered by me that true it was that God had endowed his Majesty with excellent science and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial judgment and reason of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it." [7]

The Rule of Reason.

The sound kernel of our theory is that experience of the judicial determination of controversies in the past is an indispensable guide; that no Sovereign by a simple exercise of will may make rules which, applied as they are made, as mere emanations of will, will do justice, and that the final criterion in making, interpreting, and applying legal rules must be a trained legal reason.

Not long since a professor of political science in one of our universities soberly argued for an administrative commission to interpret the statute law. Such a commission, he argued, and perhaps argued justly, would be more in touch with the popular will, and so would give to our legislation much more surely than the courts the exact meaning which was contemplated. This is not a new notion. To prevent his Code from being warped by lawyers, Frederick the Great provided a like device. Needless to say it failed, and the judges soon regained their proper function of interpretation.[8] For men soon came to see that the ultimate purpose must be to decide justly and upon principles of right the causes which arose under the Code, and that ascertaining and declaring the will of the royal lawmaker was after all but a means to that end. Neither the author of the Code nor its administrative interpreters possessed a foresight extending to every conceivable problem of human relations. It became necessary to leave the interpretation of the Code with those who were to apply it.

We may have confidence, therefore, that the common-law ideas of making and applying law and of the supremacy of law will prevail in the end. But we must not hope to save the absolute theory of law, the theory that the main rules and dogmas of nineteenth-century American common law have been intrenched in our institutions, or are ordained by nature. Such a theory, and it has been maintained and put in force too often in the immediate past, is comparable only to the stout resistance of Coke to the rise of the court of chancery, and the opposition of Holt to the law merchant. Unhappily like notions of finality have been held by some of the great lawyers of all times, in periods of growth. Nor have such notions been confined to the conservative lawyer. It is impressive to recollect that Thomas Jefferson stood for limiting the reception of the common law to the first year of George III. because it would "rid us of Mansfield's innovations!" [9] Happily the common law has always proved too vital to be confined by such theories. Much as we are bound to resist the attempts to deprive our courts of what little independence remains to them, and to make them mouth-pieces of the will of the majority for the time being, instead of oracles of reason, we must likewise oppose the notion of finality, the idea that the main dictates of legal reason for all time have been set forth fully and completely, leaving to us but a few dry details of application, wherever we encounter it. The common law is in quite as much danger from the latter as from the former.

In truth it may be that the courts also deserve to be reminded at times that they judge *sub Deo et lege*. Overambition to lay down universal rules has operated in judicial as well as in legislative law-making. It is very common to say that law is what the courts declare,—that it is the body of rules by which the courts decide causes. In a sense this is true. But unless well understood, this form of the imperative theory is no improvement upon Austin's command of the Sovereign. Neither is nor ought to be a theory of law-making.

"I think you will do as others have done in the same case," said counsel to the court of common pleas in the fourteenth century, "or else we do not know what the law is." "It is the will of the justices," responded one of the judges. "Nay," corrected the chief justice, "law is reason." [10]

7 Prohibitions del Roy, 12 Rep. 63.

8 See Schuster, The New German Code, 12 Law Quarterly Rev. 17.

9 Tyler, Letters and Times of the Tylers, I. 35.

10 Langbridge's Case, Q. B. 19 Edw. III., 375.

The Relation of the Civil Law to the Commn Law

BY HON. M. F. MORRIS

Former Associate Justice of the Court of Appeals of the District of Columbia

[The late Justice Morris was for some time a lecturer in the law department of the University of Georgetown. His work there led to the preparation of his "History of the Development of Law," from which this extract is made by permission of the publishers, John Byrne & Company, of Washington, District of Columbia. Copyright 1909.]

IN the great turmoil of the disruption of the Roman Empire by the Teutonic barbarians, what of Britain? The country was then called Britain, as will be remembered, and not England. This is a later appellation. And it was inhabited by a branch of the great Celtic race, which had peopled all of Western Europe,—Romanized and civilized by four centuries of Roman occupation. The barbarians broke into Britain too; and ruin and desolation marked where the Anglo-Saxon savages came. Populous cities disappeared, or shrank into miserable villages. Fertile fields became barren wastes; commerce died; the Roman civilization perished, and for 200 years and upwards barbarism reigned supreme over Britain. Even the very name of the country was lost for several ages, and when the island emerged again from darkness into the morning twilight of a feeble civilization, and became sufficiently self-conscious to require a new name, it received that of England.

Alfred the Great.

Two great monarchs of the Anglo-Saxon line were eminent as legislators, Alfred the Great (A. D. 871-901) and Edward the Confessor (A. D. 1043-1066); and one of these, Alfred, seems to deserve the character which he has generally received from impartial historians, as having been one of the most perfect civic personages in all the annals of time. Apparently only nine such personages can be enumerated, and Alfred is not the least illustrious among them. To Alfred has often been attributed the institution of trial by jury. He did not institute it. It had no existence in England for more than 200 years after his time, when it was introduced by the Normans, who themselves had derived it from the Franks. (See Pollock & M. History of English Law, 2d ed. vol. 1, chap. 6.) But he is known to have done much for the jurisprudence of his country. He borrowed much from the Brehon laws of Ireland; and no doubt in his visit to Rome, he had learned something of the Roman civil law.

Laws of Edward the Confessor.

Edward the Confessor had spent much of his early life on the continent of Europe, an exile from his native country; and the civil law of Rome was then making rapid strides for its rehabilitation. He obtained the reputation in after times of being the great lawgiver of his country. Whenever, during the Norman and Plantagenet periods, the people were oppressed or became dissatisfied with existing conditions, their dissatisfaction always found expression in a demand for the restoration of the laws of the sainted Edward. It is not quite apparent what these laws were for which they clamored; and it seems to have been no more than the popular fancy to attribute to him and to the great Alfred the enactment of much legislation which did not exist in their day, and so to attribute it merely as a ground for its introduction.

But whatever either Alfred or Edward did for the improvement of the Anglo-Saxon jurisprudence, they had but two sources from which to draw inspiration, the civil law of Rome and the Brehon law of Ireland; and upon both they seem to have liberally drawn. The common law of England, as they had it in the days of Coke and Blackstone, had but little existence in the Anglo-Saxon period of English history.

The Feudal System.

When, in A. D. 1066, the Anglo-Saxons in their turn were treated to a taste of the cup of bitterness which they themselved had proffered to the Britons 600 years before, and William of Normandy, with his hungry horde of buccaneers, descended in large part from the old Scandinavian pirates and freebooters of the North seas, invaded and subjugated England, the Conqueror found the feudal system, then at its zenith on the continent of Europe, a ready instrument for the consolidation of his conquest; and he established a military despotism which for a time was the most oppressive and the most tyrannical in Europe. He confiscated nearly all the land, despoiled and impoverished the previous Anglo-Saxon proprietors, and parceled out their holdings among his own followers upon a purely military tenure for services rendered and thereafter to be rendered. The principal beneficiaries of the spoil subdivided the land among their own retainers upon a similar military tenure. The Anglo-Saxons, like the Helots of Lacedaemon, were reduced to a state of serfdom or villeinage, as it was called, between which and abject slavery there was but little practical difference. They were fixed to the soil, and could not leave it without the permission of their feudal masters, for whom they were required to toil and till the land. The feudal system in its most aggravated form was firmly fixed upon England. It was the beginning of an entirely new social system, and necessarily, therefore, of a new jurisprudence; and from this time is to be dated the beginning of the common law of England.

Lawless Norman Monarchs.

There was not much law in England in the time of William the Conqueror and his immediate successors. Might made right in those days, and lawless monarchs and lawless barons had but little regard for the principles or the practice of jurisprudence. It is true, however, as already stated, that William established a court, the *aula regia*, or royal court, with a Norman bishop as its head, called the chief justiciary, for the general administration of justice. But there was no certain or fixed system of law, much less any code of law. There was something like a legal system in Normandy, under the influence of the Roman and Carlovingian civilization in France, which had succeeded in humanizing even the rude descendants of the Northmen, who had wrested the province from France; but it was mainly the criminal classes of Normandy, and adventurers in search of spoil, who accompanied and followed William to England; and these had no great use for law. Consequently the *aula regia* had only the rudest usages of feudalism to administer as law. In the total absence of legal system, its administration of justice was almost of necessity arbitrary, vacillating, and uncertain. It was this condition of things that so frequently induced the popular demand, to which reference has already been made, for a restoration of the laws of Edward the Confessor, the wisdom of which the Norman barons appreciated.

Development of Common Law.

In the works of Glanville, Bracton, Britton, Fleta, Littleton, Coke, and Blackstone, we find the exposition and the development of the common law of England from the time of the Norman Conqueror and the early Plantagenets down to the latter part of the eighteenth century. Two events then occurred, which, according as we look at the matter from different points of view, tended either remarkably to accelerate that development, or else to subvert the whole foundation on which it was based, and to substitute therefor a radically new system of jurisprudence. One of these was the appointment of William Mur-

ray, Lord Mansfield, a Scottish jurist and a doctor of the Roman civil law, to the position of chief justice of the King's bench in A. D. 1756, a position which he held and filled admirably for thirty-two years, when he voluntarily relinquished it in the same year (A. D. 1788) in which our Federal Constitution was adopted, and during his incumbency of which, he, quietly and yet substantially, effected by his rulings in court an almost entire revolution in the common law, more in accordance with the requirements of our advancing civilization than were the tenets of Coke and Blackstone. He was the contemporary of the latter, who was his colleague on the bench; but he was a far abler and more accomplished man than Sir William Blackstone. He was one of the few really great judges of England. There were only three in all. Sir Thomas More and Sir Matthew Hale were the other two. All three were model judges,—men who, not only by their great ability, their learning, and their accomplishments, but even more by their personal dignity, their suavity, their unvarying courtesy, and their high moral character, commended themselves alike to the love of their contemporaries and to the respect and esteem of all subsequent generations. From the Roman civil law, Lord Mansfield introduced into the common law the law merchant or mercantile law, and laid the foundation for the introduction of the law of bailments, to both of which the common law had previously been a stranger. And he paved the way for the great improvements of the nineteenth century. No other Englishman, except perhaps Lord Bacon, has done more for civilization than the Earl of Mansfield.

Introduction of Civil Law.

Strangely enough, while the common law of England must be dated from the time of the introduction of feudalism into the country by William the Conqueror, the germs of the Roman jurisprudence and of the Roman civil law were introduced at the same time, or very soon afterwards. The Roman jurisprudence, as we have seen elsewhere, under the influence of the ecclesiastical authorities and of the legislation of Charlemagne, was then making great progress in France. It had never wholly perished from that country. It had received a serious check in Normandy when the Northmen wrested that rich province from the later Carlovingian monarchs; but it survived that disaster, and resumed its encroachments upon the common law of feudalism, according as the Northmen yielded more and more to the Roman-Frankish civilization.

Many of the Norman prelates, versed both in the common law and in the civil law of Rome, went over to England with William the Conqueror, and became prominent in his councils and in those of his successors.

A "keeper of the King's conscience," as he was called, was appointed from very early times. He was always a bishop. From the time of the Norman conquest down to the reign of Henry VIII., this official was always a high dignitary of the church, and ranked next to the King in dignity. The celebrated Cardinal Wolsey was the last of the long line. The "keeper of the King's conscience" became virtually what we would now call prime minister.

Rise of Equity.

How the courts of King's bench and exchequer drew to themselves concurrent jurisdiction with the court of common pleas in many cases need not here be stated.

The methods and processes of these courts seem to have been fairly sufficient for the times of the Norman and Plantagenet kings, and down even into the Tudor times. They built up an elaborate, and to a great extent exceedingly artificial, system of pleading and practice. In many instances, as in the matter of common fines and recoveries (see Blackstone, bk. 2, chap. 21), their procedure was puerile and almost ludicrous, although for the time they served a useful purpose; and very often the processes of the courts tended to encourage chicanery rather than to further the ends of justice. But there were many cases where they wholly failed to meet the requirements of justice; and, as com-

merce and civilization advanced, these cases were greatly multiplied, and the deficiencies of the common law became more apparent. Appeals to the keeper of the King's conscience became more numerous, and the chancellor, as he then commenced to be called, was more frequently entreated to find a remedy. He never failed to find it in the ready storehouse of the Roman civil law, with which, as an ecclesiastic, he was always well acquainted, and he administered the remedy under the name of "Equity,"—which we can now see to be only a synonym for justice, as distinguished from the rigidity of the law. Equity, therefore, is no more than the combination of those parts of the Roman civil law which the chancellor of England was called upon from time to time to introduce. It is not, stricly speaking, a system, for it has no coherence in itself. It is composed of fragmentary portions of the Roman law, without connection with each other. For it is to be remembered that the rule was early laid down which yet prevails, that we are not to have recourse to the chancery court unless there is no remedy, or only an inadequate remedy, at common law. Hence arises the difficulty which has always existed, of defining the meaning of equity jurisprudence, and the scope and extent of the jurisdiction of the court of chancery.

Triumph of Chancery.

The growth of this jurisdiction was not unopposed in England. In fact, there was bitter antagonism to it manifested both by the courts of the common law and by the Parliaments of England,—indeed, by almost every Parliament without exception down to the beginning of the eighteenth century.

The triumph of the court of chancery through the efforts of Bacon and Ellesmere was distinctly a triumph of the civil law of Rome over the common law of England. The Roman law thereby became entrenched in the very citadel of its most persistent enemy; and it grew and flourished, and became enlarged, while its rival, except for the additions to it made by Mansfield, remained practically stationary. The common law had no flexibility; the jurisprudence of equity readily adapted itself to all the increasing demands and requirements of advancing humanity.

Parliamentary Legislation.

The present British Constitution, for the origin of which it is the custom of various writers, English and American, to seek back into the morning twilight of the ages, can be dated very specifically from the enactment of what is known in English history as the reform act of A. D. 1832, in pursuance of which Parliaments of the people of England were finally established.

As soon as the people obtained power, the Parliament began truly to legislate; and the records of the nineteenth century show the greatest activity, not only in remodeling the political institutions of the country, but likewise in the improvement of its jurisprudence. Into the details of this legislation it is unnecessary here to enter. Suffice it to say that every modification made in the existing common law was in the line of the introduction or restoration of some rule or principle of the Roman civil law, many of them substantially to the same effect as laid down in the Code Napoleon.

Reorganization of English Judicial System.

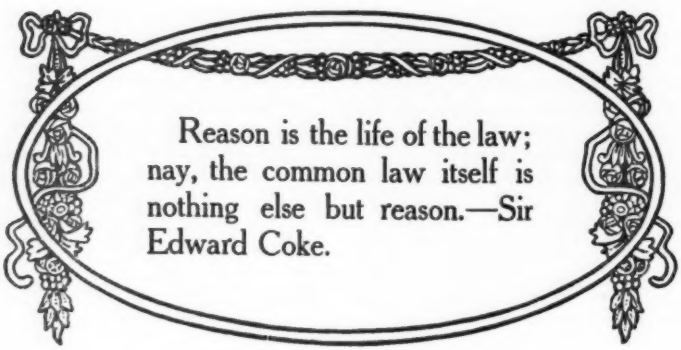
Many and radical have been the changes effected. They may be said to have culminated in a series of remarkable enactments passed in the years 1873, 1874, and 1875, commonly known in England as the supreme court of judicature acts, because their main purpose was a total reorganization of the English judicial system. By these acts that system was completely remodeled. All the old immemorial courts of Westminster, the King's bench, the common pleas, the exchequer, and all the rest of them, were abolished; and one supreme court of judicature, as it was called, was established in their place, with the lord chancellor at its head, and the chief justice of the court of King's bench, or the chief justice of England, as he is now called, as next in rank to the chancellor, as a member of the court. This new

tribunal was to have general jurisdiction of all causes, both civil and criminal; and it was authorized by the statute to subdivide itself into different branches for the performance of the different classes of business. For these branches the old names of chancery, King's bench, common pleas, probate, and admiralty were retained; and a court of appeals was provided within the supreme court of judicature, composed of the chancellor, the chief justice, and three lords of appeal, as they were called, to sit in review of the decisions of the subordinate branches.

But this reorganization of the English judicial system, radical though it was, might well be regarded as a mere detail, without significance as to the great underlying contest between the Roman civil law and the English common law, were it not for a single short sentence in one of the enactments, most momentous and far-reaching in its scope. It was to the effect that thereafter, whenever the rules of the common law and those of equity were in conflict, the rules of equity should prevail. This was a final statutory acknowledgment of the superiority of the Roman jurisprudence over the common law of England, and a substitution, as far as it was then deemed possible, of the former for the latter. It was the consummation of the victory won by Bacon and Ellesmere over Coke. It was the final triumph of the Roman civil law over the tenets of feudalism in feudalism's last stronghold. The great contest was practically at an end forever.

Disappearance of Feudalism.

It is very true that many of the traces of feudalism yet remain in the jurisprudence, and yet more in the social system, of England; and it may be many a day before all these traces are eliminated. The country yet clings to its aristocracy, to its antiquated House of Lords, to the abomination of a state church, to the doctrine of primogeniture, to the exclusion of females by the males in matter of inheritance, to the laws of entail, although these are now greatly restricted, and to some other features of the ancient feudal tenures. But it is very plain to every student of the history of the times, that all these will sooner or later be eradicated; and that it is only a question of time when every trace of feudalism will disappear from the English jurisprudence.



Readaptation of the Common Law

BY W. W. BILLSON

Of the Duluth Bar

OW largely is it to be the legitimate function of the bench and bar to participate in the reconciliation of law and justice, and in the readaptations of the law, to ever modifying conditions. There prevails in some quarters a feeling that judicial activities of that kind are less legitimate than formerly; that the modern perfection of legislative machinery and methods, the habituation of the public to their free use, and the constitutional separation of the judicial and legislative powers, should be deemed to have made it both unnecessary and unpermissible for courts to strain, with their old-time freedom, the formulas of the law, in order to reconcile them to changed popular concepts or social conditions; that modifications so effected are legislative in character, and are to be tolerated in the judiciary only so long as governmental powers are still confused, and legislation imperfectly developed. This is a view which no doubt has the advantage of easing the responsibilities of both court and counsel. Of the court, by shifting upon the legislature accountability for any unfitness in the law; of counsel, by eliminating from his calculations the complicating factor of the change in conditions, and enabling him to advise his client with the greater assurance. The professional advantages thus flowing from this theory are, however, far from being the cause of its currency. That will be found deeper down, in a too restricted notion of the normal scope of judicial power,—induced by a disregard of the self-renovating capacities which are a characteristic of every progressive system of law; and in a sadly exaggerated estimate of the possible efficiency of legislation as a substitute for the judicial constructions which have always played so large a part in the laws' gradual amelioration.

Judicial Interpretation.

The arts of legal interpretation practised by English-speaking courts have always been genuine, not spurious, as sometimes upon the continent of Europe. It was the strictness with which our common-law judges restrained themselves to legitimate legal constructions that was a principal cause of the rise of equity as an independent jurisdiction; nor has there ever been a period when their practice in this regard has outrun their strictly judicial functions. Without an incessant mediation by the courts between the formulas and precedents of the law on the one hand and the existing popular and judicial consciousness on the other, there never has been or can be a progressive law. It is as essentially the nature of law as of language to progress through a multitude of minute modifications responsively to subtle mutations of thought or feeling. It is generally the intercourse that takes place between the popular and judicial mind on the one hand, and the law as thus minutely changed on the other, that makes possible the next succeeding change, and so on *ad infinitum*, our progress thus being made, as in the case of walking, where each short step, insignificant in itself, is laden with import as being the condition precedent of its successor.

The machinery of legislation is well enough adapted to the settlement of matters of class controversy, or otherwise broad popular interest, which tend to become the subject-matter of political contention. It is indispensable, of course, to any radical reconstruction of the law, and to many modifications to which the common law is incapable of subjecting itself. It has its uses in compiling and preserving in codified form the rules of

law disclosed by custom or judicial decision. But even beneath such burdens as these, it staggers more visibly than any other department of our government, without undertaking to succeed the judiciary in its ceaseless succession of minute and delicate tasks of mediation between the law and its social environment. It is through the incessant intercourse of the courts with the countless principles and distinctions of the law in the trial of causes, that they have been able to keep them reasonably tempered and attuned to the social life and intellectual conditions of which they are designed to be a reflection; and the transfer of the function, without the advantages of that intercourse, can spell failure only. The very conditions of the successful exercise of the function thus attest its judicial character.

Judicial Legislation.

The general subject has been long befogged by the English analysts in their efforts to identify all law as the command of a sovereign. In order to do so, judicial interpretations of the common law must be classed as a veiled and illicit form of legislation, and this they have not hesitated to do. Much of that spirit and policy entered into Sir Henry Maine's unpardonable classification of all our case law as resting on legal fictions, treating it as more distinctively than anything else a quaint device for effecting unavowed modifications in the law during periods of superstitious disrelish of change.

Principle of Life in Common Law.

Now all this is upon the assumption that the common law is unendowed with any true, lasting, internal, normal principles of life and growth. That it is not a living organism, but a mass of inert formulas. That it has none of the properties of a self-purifying stream, but is a stagnant pool, to be stirred only by legislation or some makeshift substitute. I undertake to say that the common law of no progressive nation has ever so constituted or so conceived itself. Every such system, in periods however conservative, has been avowedly conscious of substantial internal powers of self-renovation.

Those powers are, of course, far from being all-sufficient, or such as to make legislation unnecessary. There never were, for any purpose, more mutually complementary or mutually indispensable agencies than judicial interpretation and legislation are, and ever will be, in the production of law. My contention goes no further than this: that the common law has always possessed internal principles of life and growth so normal and so valuable that a lack of professional or judicial diligence in their conservation would be an offense against the public welfare. A few illustrations of such principles may serve to make my meaning more clear.

Reason of the Law.

The most fruitful, perhaps, is the acknowledged principle that the law consists, not in its particular rules or precedents, but in the general principles of reason which gave those birth. Those particular rules were deductions of reason, made with reference to the social and intellectual conditions at the time existing. It follows, as the night the day, that when those conditions materially change, the rules change with them, not by force of any fiction, or any real or disguised act of legislation, or judicial usurpation or caprice, but because the conditions which wrung the particular rule from the underlying general reason of the law no longer exist, and other conditions have supervened, calling for a different rule. Does not this one indubitable principle tend to impart to the rules and formulas of the law something of the same mutability that characterizes social conditions? Hence we have, as an ever present process of decay in the body of the law, the principle that when the reason ceases, the law ceases with it, and, as a process of growth or regeneration, we have the correlative principle that like reason makes like law. Mr. Maine, in one of his works, says that when irrigation is first introduced into an Indian village, the villagers will determine unhesitatingly the rules which must govern the distribution and transmission of the water rights. He marvels, how-

ever, that, in accounting for such rules, the villagers have recourse to a fictitious assumption of ancient custom with the same apparent candor as though they had been dealing with such waters for generations. In commenting upon this incident, Sir Alfred Lyall makes the very convincing suggestion that the lightning village calculators that so interested Mr. Maine were not making any fictitious assumptions, but were merely applying to water rights rules which they had long been accustomed to apply in other connections. It is simply a good, though unnecessary, illustration of normal and familiar growth through the principle that like reason makes like law. But even so, upon second thought, it would still be fiction according to Mr. Maine.

Contraction or Expansion of Legal Rules.

Another way may be noticed in which the particular rules of the law contract or expand by reference to the underlying general reason. Every legal rule being as broad as its reason and no broader, it is one of the laws of its life that it must dilate or contract responsively and commensurably to the changes that may occur in the judicial conception of its underlying reason; a conception which, in its turn, should and must be modified from time to time by the moral, intellectual, and industrial developments in the life of the community. The importance of this principle is greatly enhanced by the fact that determinations of the reasons of a rule are unaffected by the principle *stare decisis*. The rule becomes settled for the particular class of cases, but for other purposes the reasons are always open to review.

Consideration of Results.

Another agency which can be wielded by the common law with tremendous effect toward its own renovation is the principle which permits it to modify its reasoning and readjust all its scales and standards, by consideration of favor or disfavor toward particular results. This grand old distinction, rock-ribbed in the law, between things favored and things odious, is what makes the law a moral science, rather than a system of logical deductions. A volume would hardly suffice to illustrate all the ways in which the law has utilized this principle for its own amelioration. We are generally less appreciative than we should be of the dominance of this principle in the law, because its presence is often concealed beneath the use of words and ostensible use of standards, void of moral quality. Thus, when, in the adjustments of legal liability, it is said that we look only to the proximate cause, our standard seems to be purely logical. But when we get down to work, the law provides us with different standards of proximity, the standard being more far-reaching in cases of wilful wrong. The notion of waiver seems logical rather than moral, yet here again the moral bias of the law asserts itself, and provides us one standard where the thing supposed to have been waived is a forfeiture, and another where it is an equity. So in the case of estoppels. So where the question is whether one's residence is upon a particular tract of land, and it proves to be partly on that tract and partly on adjacent land. The law's judgment will be controlled by the favor or disfavor with which it regards claims of the class involved. Entry is made into the possession of land. Of how much land is possession taken. It looks like a physical question. But it depends upon whether the claimant is favored by the law. If he is a trespasser, he is in possession only of the part actually occupied. If he is a rightful owner, he is in possession of the whole tract. So the law of fixtures is formulated to turn upon the mode and degree of annexation to the land. But the law, nevertheless, honeycombs the subject with ethical distinctions, applying one standard between vendor and vendee, another between the landlord and tenant, and so forth. Whether a shipper is bound by conditions printed on a bill of lading may depend upon whether he has assented to the condition. Because some conditions are favored and some odious, the law applies different standards of assent, accepting as sufficient certain evidence of assent to conditions designed to insure fair dealing, while rejecting the same evidence as insufficient to show waiver of common-law liability. The sweeping distinction be-

tween strict and liberal construction springs from the same principle. And so on indefinitely. Now, while the instances cited illustrate mainly the influence of the law's moral bias in original construction of its rules, it operates also with great efficiency in their readaptation from time to time to the public needs, sometimes through the gradual abrasion of the substantive rule, and sometimes by raising obstacles to its enforcement.

Modification of Legal Rules.

It is, of course, only upon some special ground, such as the ceasing of the law's reason, that a court, however odious a rule may be, can reverse it. But it can gradually modify it or wear it away. In many instances this process of gradual abrasion has gone on until a rule and its exceptions have changed places, the exception becoming the rule and the rule the exception. This capacity of the law to gradually waste away a rule odious in its results, and to gradually build up one whose results are favored, accomplishing it all by a long succession of minute variations, is of the very heart or essence of the judicial function; it is one of the foremost life processes of the law, in no sense illicit or reprehensible. The process—one of the great agencies for the production of law—is strikingly comparable to that carried on in physical nature by the tendency to minute variations acting in concert with the struggle for existence. The process of minute juridical variations opens the gate to new law, and law's moral bias determines what direction the variations shall take, just as the struggle for existence determines what variations shall ultimately prevail. It is a process of life, truly cosmic in its proportions and in its methods.

Interesting illustrations of the law's capacity for modifying it practical workings so as to conform to new conditions, even without largely changing its substantive rules, are found in the methods resorted to in order to arrest the inclosure of commons in England, and in order to gradually wear away feudal dues and oppressions, and enlarge the area of free holdings in socage at the expense of the servile tenures.

In the early part of the last century, after the inclosure of commons had long been proceeding upon a large scale with the favor of the law, public sentiment suddenly awakened to the fact that no public breathing places or commons would be left, unless the process of inclosure were speedily arrested. The common law immediately brought to bear all its leverages for erecting barriers to further inclosure, with the result that in litigated cases the tide was completely turned and proceedings for inclosure as uniformly defeated as formerly they had uniformly prevailed. This was accomplished mainly by resort to prima facie presumptions, by modifying the burden of proof, and by requiring higher standards of certainty in proofs adduced in support of proposed inclosures.

It was by recourse to the same methods, without modification of the substantive law, that the common law courts carried on for generations the conversion of servile tenures into copyholds, and of copyholds into free tenures, and the mitigation generally of the extreme and more oppressive incidents of the feudal relation. How important a factor this was in the general well-being, and in the harmonization of the law with the conditions of modern life, is placed in a very strong light by the fact that so skilled an observer as Sir Henry Maine has expressed the opinion that the violence of the French Revolution was largely due to the failure of the courts of France similarly to mediate between the old law and the new conditions of life. The courts of France exercised in support of the feudal rights the same methods that were so effectively employed by the English courts to break them down. The result was that in France the social and commercial life of the eighteenth century found itself galled and harrowed by a fifteenth century system of law. The eruption that followed it is unnecessary to describe.

That I have not presented a misconception of the common law, or erred in esteeming it a living and internally progressive system, such considerations as these seem to amply attest.

Editorial Comment

One God, one law, one element.
And one far-off divine event
To which the whole creation moves.
—*Tennyson.*

Case and Comment
THE LAWYERS MAGAZINE

Vol. 18 JANUARY, 1912 No. 8

Established 1894.

¶ Edited, printed and published monthly, by The Lawyers Co-operative Publishing Company: President, W. B. Hale; Vice-President, J. B. Bryan; Secretary, B. A. Rich; Treasurer, W. H. Briggs.

¶ Office and plant: Aqueduct Building, Rochester, New York.

¶ TERMS:—Subscription price $1 a year, 10 cents a copy. Advertising rates on application. Forms close 15th of Month preceding date of issue.

¶ EDITORIAL POLICY:—It is the purpose of CASE AND COMMENT to voice the highest legal and ethical conceptions of the times; to act as a vehicle for the dissemination and interchange of the best thought of the members of the legal profession; to be both helpful and entertaining,—serving the attorney both in his work and in his hours of relaxation.

Edited by Asa W. Russell.

It's a wise man who can keep his own counsel, but its a wiser one who can sell it, like the lawyer.

* * * *

Without being unduly religious, the average barrister attends with zeal to the Law and the Profits.

* * * *

Christianity and the Common Law

ARCHBISHOP Whately, in his preface to the Elements of Rhetoric, says: "It has been declared by the highest legal authorities that 'Christianity is part of the law of the land,' and consequently that anyone who impugns it is liable to prosecution. What is the precise meaning of the above legal maxim, I do not profess to determine, having never met with anyone who could explain it to me; but evidently the mere circumstance that we have religion by law established does not of itself imply the illegality of arguing against that religion."

It seems difficult, says an accomplished writer (Townsend, St. Tr. vol. II. p. 389), to render more intelligible a maxim which has perplexed so learned a critic. Christianity was pronounced to be part of the common law in contradistinction to the ecclesiastical law, for the purpose of proving that the temporal courts, as well as the courts spiritual had jurisdiction over offenses against it. Blasphemies against God and religion are properly cognizable by the law of the land, as they disturb the foundations on which the peace and good order of society rest, root up the principle of positive laws and penal restraints, and remove the chief sanction for truth, without which no question of property could be decided and no criminal brought to justice. Christianity is part of the common law, as its root and branch, its majesty and pillar,—as much a component part of that law as the government and maintenance of social order. The inference of the learned archbishop, however, seems scarcely accurate, that all who impugn this part of the law must be prosecuted.

The English commissioners on criminal law, in their Sixth Report, p. 83 (1841), have thus clearly explained their sense of the celebrated passage: "The meaning of the expression used by Lord Hale, that 'Christianity was parcel of the laws of England,' though often cited in subsequent cases, has, we think, been much misunderstood. It appears to us that the expression can only mean either that, as a great part of the securities of our legal system consist of judicial and

official oaths sworn upon the Gospels, Christianity is closely interwoven with our municipal law, or that the laws of England, like all municipal laws of a Christian country, must, upon principles of general jurisprudence, be subservient to the positive rules of Christianity. In that sense Christianity may justly be said to be incorporated with the law of England so as to form parcel of it; and it was probably in this sense that Lord Hale intended the expression should be understood. At all events, in whatever sense the expression is to be understood, it does not appear to us to supply any reason in favor of the rule that arguments may not be used against it; for it is not criminal to speak or write either against the common law of England generally, or against particular portions of it, provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance."

A recent writer in the Canada Law Journal observes: "Who can now read of all the burnings and tortures of past ages done in the sacred name of the Christian religion without feeling how very far removed all such proceedings are from that religion when properly understood? How much of this cruelty was due to real, though mistaken, zeal for what was regarded as truth, and how much to a desire to enforce a system of spiritual tyranny and terrorism, who can tell?

"Ever since the seventeenth century, forces have been at work in England and among all English-speaking people, which have materially modified the administration of the law in this respect. Toleration of all religious opinions which do not conflict with decency and public morality has also become a part of the law of the land; and this toleration, to be effective, must involve, as a necessary consequence, the right to advocate beliefs and doctrines contrary to the Christian religion. This changed condition of things has involved a change in the attitude of the courts to those who publicly advocate beliefs and doctrines contrary to Christianity, provided they do so with some regard to morality and to a decent respect for the religious feelings of others."

There is a sense in which Christianity is an abiding and potent part of the law of the land—an eternal and imperishable part of it. This relation arises from the essential nature of Christianity. It existed as a system anterior to the common law, and is not the product of human legislation or an outgrowth of popular custom. It is a brooding, omnipresent, pervasive principle, recognized by our lawgivers, wrought into the fabric of our state and institutions, and closely intertwined with the lives of our people. It is the incentive of our charities and the basis of our civilization. It is the supreme test which we consciously or unconsciously apply to social or political problems. It is the spiritual and dominant part of our laws, and, however feebly obeyed, must so remain, if we are to work out our national destiny within the pale of Christendom.

Free Legal Aid Bureaus

THE value of the free legal aid bureau, says the Kansas City Journal, has been demonstrated on many occasions, but rarely more conspicuously than when it took up the cause of a number of waitresses whose valid claims against a defunct concern would in all probability have been overlooked had they not been represented by counsel. In the nature of things, working girls, whose claims averaged only a few dollars each, could not employ attorneys to look out for their small interests, but the very fact that they were working girls made even the most modest of claims matters of importance to them.

The moral effect upon the unscrupulous of the knowledge that there stands between them and those needing protection an organization of such potency is probably the most telling influence exerted by the bureau, as has been proved on numerous occasions when the mere demand for redress of wrongs has been met with alacrity.

In commenting on this line of work, the St. Louis Republic observes: "Our philanthropic lawyers are going to provide free, or nearly free, litigations for the poor. That is, they will take poor

people's cases for nothing or next to nothing.

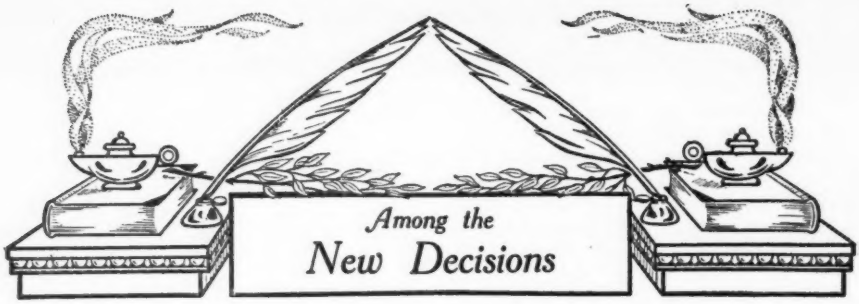
"We should condemn this philanthropic enterprise if its object were to encourage pauperism. But this is not the case. The guiding object is "to help people to help themselves," and the litigants will be allowed to pay whatever they can, be it ever so humble. So that we commend it cordially, and the more so since a special purpose will be to attack loan sharks that wring usury out of the poor.

"In such excellent work every member of the bar might well bear a part. But it appears that the older members have left it all for the young ones. Every name in the list of those actively interested is that of a young man. Are only young lawyers philanthropic? Do they become colder and less unselfish as years wear on? Have old lawyers no time for poor clients, and no sympathies?"

There has never been a time in the history of the American Bar, when many of its members in their private practice did not unostentatiously and freely give their professional skill to deserving persons who were unable to recompense them. The establishment of free legal aid bureaus but emphasizes a trait of the legal profession which has never been adequately recognized or appreciated, and the extent of which has never been half revealed. The public has been inclined to point out the shortcomings of the lawyers rather than their virtues. Too much, however, cannot fairly be demanded of the legal profession in the way of charitable and unrequited service. The law is the lawyer's business and his means of livelihood. He has fitted himself for it by years of arduous preparation, and ought not, any more than any other business man, to be expected to give the public too freely of his stock in trade.

A Grave Defect

IN the new English court of Criminal appeal, the first capital case was recently passed upon, says the New York Evening Post, and it revealed a serious defect in the law creating the court, novel in British judicial procedure. A convicted murderer appealed on the ground that the jury in the court below had been improperly directed as to certain corroborative evidence. The judges on appeal found the plea to be well taken. Without asserting the innocence of the accused man,—indeed, it is evident that they believe him guilty,—the judges declare that they cannot be certain that the jury would have convicted him if it had not been misinformed as to the nature of part of the evidence against him. Hence the verdict was quashed; but now comes the surprising thing,—the court of criminal appeal is not able, under the law, to order a new trial! Over this lack of power, Justice Darling expressed sincere regret, saying that the court felt that the case was one in which it was eminently desirable that "all the facts should again be submitted to a jury with an adequate and proper direction." Unhappily, the statute did not confer authority to order a new trial in criminal cases, though it did in civil. Justice Darling significantly added that he hoped that what the court said on this point would be "considered by those who had power to amend the law in this respect." One would think so! The right of criminal appeal was established in England as a safeguard against possible injustice to the innocent; it could never have been intended to permit a man charged with atrocious crime to escape by means of a loophole in the law. To close it will certainly be the immediate duty of Parliament.



Carrier — standing passenger — sudden stop — injury — liability. The mere fact that a passenger standing in a street car falls and is injured by the sudden checking of the speed of the car is held in the recent Michigan case of Ottinger v. Detroit United R. Co. 131 N. W. 528, annotated in 34 L.R.A.(N.S.) 225, not to render the carrier liable for the injury.

Carrier — second demand for fare — duty of passenger. A passenger whose ticket has been taken up by the conductor is held in the recent Michigan case of Light v. Detroit & M. R. Co. 130 N. W. 1124, not bound to borrow money to avoid ejection from the train, when fare is demanded from him a second time.

The recent decisions on the question of the duty of a passenger to pay fare wrongfully demanded, in order to avoid expulsion and lessen damages, which are gathered in the note appended to the foregoing case in 34 L.R.A.(N.S.) 282, largely support the rule that the passenger may stand upon his right to transportation, and need not pay the additional fare. The earlier decisions which were collected in a note in 43 L.R.A. 706, were quite evenly divided as to whether or not a passenger should, if able, pay a fare wrongfully demanded.

Conflict of laws — contract — formation and execution in different states. That a carriage contract containing a limitation of liability clause, which is void at the place where it is made because executed on Sunday, cannot be declared valid and enforced because a portion of the service was to be performed in another state where it would have been valid, and where the injury for which the carrier is sought to be held liable occurred, is determined in Lovell v. Boston & M. R. Co. 75 N. H. 568, 78 Atl. 621, which is accompanied in 34 L.R.A.(N.S.) 67, by a note in which the cases relating to the conflict of laws as to Sunday contracts are collated and discussed.

Conspiracy — unlawful use of automobile. The recent South Carolina case of State v. Davis, 70 S. E. 811, 34 L.R.A.(N.S.) 295, holding that an agreement of two or more persons to take and use another's automobile without authority may be punished as a criminal conspiracy, seems to be one of first impression upon the question as to criminal responsibility for using an automobile without the owner's consent.

Copyright — infringement — moving pictures. The public exhibition of moving pictures of the incidents of a copyrighted book was held in Kalem Co. v. Harper Bros. Adv. S. U. S. 1911, p. 20, 32 Sup. Ct. Rep. 20, to constitute an infringement of the exclusive right given to the author by the copyright laws, to dramatize his work. The court further held that the makers of the films, who sell the same with the expectation that they will be so used, are contributory infringers, and that the copyright laws as so construed were within the power of Congress.

Criminal law — plea of guilty — coercion — new trial. One who, upon the day he is indicted for homicide, enters

a plea of guilty because he is informed that the trial judge has stated that if he is to do so, he had better do it before the train leaves which would take him to a jail in another county, as mob violence is feared, and is immediately found guilty, sentenced to death, and taken to such jail, is held in Little v. Com. 142 Ky. 92, 133 S. W. 1149, entitled to a new trial, and permission to withdraw his plea.

This decision, as appears by the note appended to the report of the case in 34 L.R.A.(N.S.) 257, is in accord with the unanimous holding of the courts.

Damages — stipulation — exchange of property. A stipulation in a contract for the exchange of several parcels of real estate, for the payment of $500 as liquidated damages in case of breach, is held in Madler v. Silverstone, 55 Wash. 159, 104 Pac. 165, to be a provision for stipulated damages, and not for a penalty, since the damages to be suffered from breach are uncertain in their nature, and the sum stipulated is not so disproportionate to the probable damages suffered as to appear unconscionable.

Probably no branch of the law has been more involved in obscurity by contradictory provisions than the subject of the distinction between penalties and liquidated damages. The question whether a provision for the payment of a sum of money by one party to the other, in a contract for the sale or purchase of land, is, in the event of default, to be construed as a penalty or as stipulated damages, is considered in an exhaustive note appended to the report of the foregoing case, in 34 L.R.A.(N.S.) 1.

Guardian — false imprisonment of ward — right of action. Although numerous cases have arisen involving the right to the custody of infants and incompetent persons, Barker v. Washburn, 200 N. Y. 280, 93 N. E. 958, 34 L.R.A.(N.S.) 159, seems to be a case of first impression on the question of taking an incompetent person from the custody of one entitled thereto, as a ground of action for false imprisonment. It holds that the committee of an incompetent person may, where such person has not assumed to exercise intelligent and legal volition as to his custody, maintain an action for false imprisonment against one who unlawfully takes and removes his ward from his custody, or that of those with whom he has temporarily placed him.

Homestead — liability for debts — final proof. Under the homestead law of Congress, providing that no land acquired under it shall be liable to be taken in satisfaction of a debt contracted prior to the issuing of a patent therefor, land is held in the Washington case of Sprinkle v. West, 114 Pac. 430, not subject to a judgment upon a note executed between the making of final proof and the issuance of the receiver's certificate thereon and issuance of the patent.

The decisions dealing with the liability of a claim or interest in public lands for debts contracted before the issuance of a patent are discussed in the note appended to the report of the above case in 34 L.R.A.(N.S.) 404.

Innkeeper — establishing relation of guests — failure to register. A traveler who is met at the door of an inn by a servant of the establishment, and delivers to him his baggage, which is placed with that of other guests, and who repairs to the dining room, where he is served with food, for which he pays the customary price, is held in the Tennessee case of Memphis Hotel Co. v. Hill, 136 S. W. 997, to be a guest, for the safety of whose baggage the innkeeper is responsible, although he does not register or notify the clerk or other officer of his intention to become a guest, or give any directions as to the care of his baggage.

This case is accompanied in 34 L.R.A. (N.S.) 420, by a note in which is collected the cases dealing with the question as to the time when the relation of innkeeper and guest commences.

Mechanics' lien — electricity — use in mine. Electricity furnished for power and illumination in a mine is held in the Oregon case of Grants Pass Bkg. & T. Co. v. Enterprise Min. Co. 113 Pac. 859, annotated in 34 L.R.A.(N.S.) 395, to

be within a statute giving a lien for supplies for the working and development of such property.

The novel question as to the lienability of electricity under the mechanics' lien statutes or similar enactments, involved in the above case, seems not to have been presented in any other reported decision.

Municipal corporations — displaying fireworks — injury to bystander — liability. A municipal corporation which, under statutory authority, is engaged in displaying fireworks on a public playground for the entertainment of the public, is held in the Massachusetts case of Kerr v. Brookline, 94 N. E. 257, annotated in 34 L.R.A.(N.S.) 464, not liable for injury to a bystander by the negligent discharge of a rocket.

National bank — escheat of land-power of state. The question whether a state has the right to escheat land held by a national bank was considered for the first time in First Nat. Bank v. Com. 143 Ky. 816, 137 S. W. 518, 34 L.R.A. (N.S.) 54, holding that a state may provide for the escheat of land taken by a national bank to secure a debt, after it has been held for the five years' period allowed by the Federal banking law, although no opportunity has been found to dispose of it at a fair price.

The decision seems to be correct. There is no conflict between the Federal statutes and Kentucky law with reference to the period of time a national bank, on the one hand, and all corporations, on the other, shall be allowed to hold land for such a purpose as it was held for in the case at bar. It was upon this fact that the decision was made to turn.

Pleading — common counts — sufficiency. The function of a complaint is held in the recent North Dakota case of Weber v. Lewis, 126 N. W. 105, to be to inform defendant of the nature of plaintiff's demand, to the end that he may prepare for his defense; and, if sufficient facts are alleged or may reasonably be inferred to constitue a good declaration under the common counts at common law, the same will be sustained as against an attack by general demurrer.

The conclusion reached in this case, as appears by the note appended thereto in 34 L.R.A.(N.S.) 364, has also been announced in numerous cases, though a few individual judges have been somewhat emphatic in their disapproval thereof.

Prohibition — illegal jury — interest of taxpayer. The right of a taxpayer or citizen, as such, to attack the organization of the grand jury, apparently was presented for decision for the first time in the Washington case of State ex rel. Hanna v. Main, 113 Pac. 632, holding that a taxpayer is not beneficially interested in the manner of drawing a grand jury, so as to be entitled to test its legality by writ of prohibition, under a statute authorizing the issuance of the writ on application of a person beneficially interested.

The decision is accompanied in 34 L.R.A.(N.S.) 255, by a note discussing the question as to who may challenge the array of grand jurors.

Water — percolation — pollution. It seems to be well settled by the weight of authority, and in accordance with sound reason, that one has no right to deposit upon his land refuse matter of any sort, whether in itself offensive or not, by which the water underlying his neighbor's land may be so affected through percolation as to be unfitted for its ordinary use, or injurious to vegetation.

Proof that a salt mining company deposited a large quantity of refuse salt upon its land in such manner that, by the action of the rain upon it, the water underlying an adjacent tract was impregnated with salt through percolation, so as to render it unfit for use and harmful to vegetation, is held in the recent Kansas case of Gilmore v. Royal Salt Co. 115 Pac. 541, to establish a legal wrong against the owner of such tract.

The cases treating of underground pollution of water are discussed in the note accompanying this case in 34 L.R.A. (N.S.) 48.

Recent English and Canadian Decisions

Broker — right to commission on sale effected by owner to associates of person introduced by him. A broker in whose hands real estate had been placed for sale introduced a prospective purchaser, who said that he would either take the property himself or find someone to take it. The prospective purchaser thereupon proceeded to interest some friends who agreed to go into the venture with him; and it was determined that negotiations should be opened up with the owner, with a view to obtaining more favorable terms. Before this was done, however, the prospective purchaser introduced by the broker decided to drop out of the deal, and his associates went ahead and completed the purchase. Upon this state of facts it was held in Stratton v. Vachon, 44 Can. S. C. 395, that the broker was the efficient cause of the sale and therefore entitled to recover a commission.

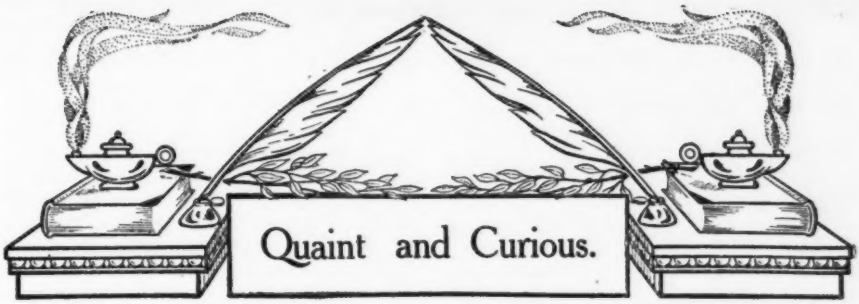
Damages — inassessability — loss of opportunity to obtain prize An interesting discussion of the question as to whether the right to recover substantial damages is affected by the existence of a contingency rendering it difficult to say whether any such damages have been sustained, or impossible to determine their amount with anything like precision, may be found in the case of Chaplin v. Hicks [1911] 2 K. B. 786, the circumstances of which are as follows: Defendant, a theatrical manager, made an offer through a newspaper that if young ladies desirous of obtaining theatrical engagements would send their photographs to the newspaper, he would, with the assistance of a committee, then select a number of photographs to be published in the newspaper, the readers of which were to select by their votes those whom they considered the most beautiful. After the voting should be completed, the manager undertook that he would see the five ladies in each of ten districts into which the United Kingdom had been divided for the purposes of the competition, whose photographs so published obtained the greatest number of votes, and from these fifty would himself select the twelve who would receive the promised engagements. The plaintiff, who was one of the fifty receiving the greatest number of votes, did not receive notice of an appointment assigned by the defendant in time to keep it; and the selection of the twelve was made from the other forty-nine. The plaintiff made attempts, but unsuccessfully, to obtain another appointment with the defendant, and eventually brought suit for damages on the ground that, by reason of defendant's breach of contract, she had lost the chance of selection for an engagement. It was contended on behalf of the defendant that the breach of contract was such that the damages, if any, obtainable in respect of it, could only be nominal, such contention being based upon two propositions: First, that the damages were too remote; and, secondly, that the chance of the plaintiff's selection as one of the twelve being dependent on the volition of the defendant, the plaintiff's loss was so entirely a matter of pure chance as to be incapable of assessment. The court of appeal, however, held that as it was not impossible to say that the possible loss sustained in consequence of the failure to give the plaintiff an opportunity of taking part in the final competition was not within the contemplation of the parties as the possible direct outcome of the breach of contract, the damages were not remote; and that the existence of a contingency which was dependent on the volition of a third person was not enough to justify them in saying that the damages were incapable of assessment, although, it was remarked, the chance or probability might, in a given case, be so slender that a jury could not properly give more than nominal damages; that the impossibility of laying down any rule by which damages may be computed with mathematical accuracy did not preclude a recovery, but that it was for the jury to do their best to estimate what would be an adequate

solatium, always giving effect to the consideration that the plaintiff's chance was only about one out of four, and that they could not tell whether she would have ultimately proved to be a winner.

Insurance — effect of assignment of property for creditors. A condition in a policy of fire insurance that, "if the property insured is assigned without a written permission indorsed hereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession, or by the operation of law, or by reason of death,"—has been held by the Ontario court of appeal, in Wade v. Rochester German F. Ins. Co. 23 Ont. L. Rep. 635, not to be contravened by an assignment for the benefit of creditors, the decision being based on the broad principle deducible from other decisions as to the effect of such condition, that unless the property is assigned so as absolutely to devest the assignor of all right, title, and interest therein and thereto, the condition does not take effect. Cases in the United States in which an assignment for the benefit of creditors has been held to avoid insurance are distinguished on the ground of difference in the phraseology of the conditions.

Nuisance — liability for, where occasioned by act of trespasser. That the owner of premises is not liable for a nuisance created thereon by the act of a trespasser, without his permission and against his will, though he may be liable for its continuance, is held in Barker v. Herbert [1911] 2 K. B. 633, where the owner of a vacant house having an area adjoining the highway, one of the rails of the railings around which had been broken away by boys playing in the street, of which damage such owner, his agents, or servants had no knowledge, or opportunity in the exercise of reasonable care to acquire knowledge, was held not liable for injuries sustained by a child which passed through the gap thus made in the railing, and fell into the area.

Wills — precatory trusts. It is remarked in Re Walton, 20 Manitoba L. Rep. 686, that while formerly there was a disposition on the part of the courts to imply a trust from the mere use of certain precatory terms, their ideas as to what is proper evidence of an intention to create such a trust have, within the past quarter century, undergone a change, so that to-day they are not so ready to construe a trust out of precatory terms alone, but will look at the whole document to see whether an obligation was intended to be imposed. It was held, however, that the three requisites to the creation of a precatory trust, —first, that the precatory words should be so used that upon the whole they ought to be construed as imperative; second, that the subject of the recommendation or wish be certain; third, that the object or persons intended to have the benefit of the recommendation be also certain,—were met by a bequest in which the testator, after bequeathing to each of his sons a portion of certain railway stock, "the share of each to be transferred in the books of the company to each of my said legatees," added: "My wish and desire, however, is that, though each of them as aforesaid, they shall not dispose of them, but only the income derived therefrom shall be expended by them respectively, and that upon the death of each of them his share shall be disposed of and the proceeds thereof divided equally amongst all my grandchildren, and, in the event of my son Percy dying and not leaving lawful issue, his share shall be sold and apportioned amongst my grandchildren, as aforesaid."



Advice to Lawyers. To a counsel arguing before him at Clerkenwell County Court, Judge Edge remarked: "Let me tell you a story of a case in which as counsel I appeared before Mr. Justice Mellor. I had used my strongest arguments, and, thinking I was not convincing him, I used some weak arguments afterward. Mr. Justice Mellor said to me: 'Now, Mr. Edge, don't put too much water in your brandy.' "—London Evening Standard.

Sent Back to Court. Sir William Wightman held office in the old court of Queen's bench, in London, far beyond the prescribed time, and at last, on the eve of the "long vacation," he took a sort of farewell of his brother judges. However, when the summer was over, he turned up smiling at Westminster Hall. "Why, Brother Wightman," said Sir Alexander Cockburn, "you told us that you intended to send in your resignation to the lord chancellor before the end of August." "So I did," said Sir William, "but when I went home and told my wife, she said, 'Why, William, what on earth do you think that we can do with you messing about the house all day?' So, you see, I was obliged to come down to court again."—Kansas City Star.

Barristers' Hairdresser. The death a few months ago of John Carter, who was known in London legal circles as the "tonsorial patriarch," removed a picturesque figure. He was connected for forty-eight years, says the Brooklyn Eagle, with the famous hairdressing establishment which bears his name and is situated in Fleet street, opposite the law courts. He was an assistant for eight years, and then the business passed into his hands. The greatest judges in the land,—brilliant K. C.'s, famous lawyers—all visited the ancient building, and all had a word for the venerable hairdresser who had watched their struggle and successes with an interest almost paternal in its nature. A full list of the famous men to whom Mr. Carter personally attended would fill pages. The following list, however, gives some idea of his distinguished clientele: Lord Hannen, Lord Brampton, Lord James of Hereford, Lord Alverstone, Lord Halsbury, Mr. Justice Grantham, Sir Rufus Isaacs, Sir Edward Carson, Sir Edward Clarke. Sir Edward Clarke was Mr. Carter's client when he was still eating his dinners in the Benchers' Hall. When youthful barristers went to him in despair, he would glance in the direction of a famous judge who was seated near, and would encourage and fill the despairing barrister with ambition by relating stories of the judge's youthful days.

In the hairdressing world he was known as the "father of the trade," and was responsible for the introduction of the machine hairbrush.

Locked in London Tower. Locked behind the drawbridge of London Tower, with a cordon of helmeted soldiers, armed with pikes, standing before the only exit! And you an American, unused to English ways!

What would you do about it? Well, if you were Charles J. Wright, a member of the local law firm of Wright Brothers, who is now visiting in London and other parts of the Old Country, observes the Springfield, Missouri, Leader, you would probably do just like

Charley did,—try not to show your fright until the soldiers went back to their posts and the bridge dropped again.

This is the way it happened. Mr. Wright, who was taking a little sojourn in England in connection with the settling up of some legal business for a local client, met a couple of Americans on shipboard while going across from Montreal to Liverpool. He afterwards met them in London, and the three, after visiting the "Old Curiosity Shop," made famous by Charles Dickens, and looking into the room where the original "Little Nell" died, went over to that famous prison, London Tower.

It isn't so very hard to gain admittance to the tower, and the party was soon inside, gazing around at the musty cells and at all of the old relics, just like a citizen of old Missouri, or any other American, naturally would. They had seen everything the keeper of the Tower would let them see, and finally decided to get back into the open air again.

Now London Tower is equipped with an electric alarm system by which are guarded the Crown jewels, kept there for safety. Whenever that alarm goes off, woe to the ones who are in the musty dungeon. The alarm went off, of course, while the Americans were preparing to leave the building. Clang went the drawbridge as it was pulled up and fastened shut, and instantly scores of soldiers, housed in little "holes" in the walls of the tower halls, sprang out with their pikes at "attention."

The Americans, including Mr. Wright, were "in," decidedly so, and they stood there until the soldiers learned that the alarm bell system was simply being tested, and went back to their posts. Then the drawbridge fell with a crash, and the Americans walked forth to freedom.

Two Ways of Saying It. While I was searching for case law the other day, writes Mr. L. G. Turner, of Pratt, Kansas, I ran across the case of Lewis v. Lewis. It is reported in the fifteenth Kansas Report.

It seems that on the 5th day of August, 1873, John A. Lewis filed his petition for divorce in the district court of Wabaunsee county, Kansas. He alleged that he had married the defendant, Mary Ann Lewis, at Edinburgh, Scotland, in May 1859; that he had resided in Kansas more than a year, and was now a resident of Wabaunsee county; that he had at all times been a faithful and dutiful husband; that defendant, disregarding her duties as a wife, and without any cause or justification therefor, had abandoned plaintiff, and that said abandonment had been continuous for more than a year.

He asked for a divorce, and for the custody of a minor child, and for a decree debarring the defendant from any interest in his property.

The service was by publication in a local paper, and by sending the defendant a copy of the petition and publication notice. The publication notice was as follows:

The State of Kansas to Mary Ann Lewis:

You will take notice that you have been sued in the district court within and for Wabaunsee county, Kansas, by John A. Lewis, plaintiff, and that unless you answer the petition filed in said action on or before the 20th day of September, 1873, said petition will be taken as true, and judgment rendered against you accordingly, severing, setting aside, and holding for naught the marriage bonds and obligations heretofore existing between you and the said plaintiff, and forever divorcing the said plaintiff from you on the grounds of abandonment. You will take notice that unless you appear and answer as aforesaid a further judgment will be rendered against you, giving to said plaintiff the care, custody, and control of the minor child, James Lewis, and giving said plaintiff such other and further relief as to the court may seem equitable and proper, and the costs of this action.

In witness whereof I have hereunto set my hand and affixed my official seal this 7th day of August, 1873.

James McCorkle,
(Seal) Clerk of the District Court.

The copy of the petition was not received by the defendant, Mary Ann Lewis, who was then at Edinburgh, Scotland. She did not have actual no-

tice of the action against her until after the judgment was rendered. She then set up the claim that she had not abandoned her husband, but that, with the consent of her husband, she had gone to Scotland for her health. Her husband, she claimed, represented that he would join her there as soon as he could wind up his affairs in Kansas.

On the 24th day of February, 1874, Mary Ann Lewis commenced a suit against her husband in the court of sessions of Edinburgh, Scotland. John A. Lewis was served with summons from the Scotland court. The summons was as follows:

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, to messengers-at-arms, our sheriffs, in that part conjunctly and severally specially constituted, greeting:

"Whereas, it is humbly meant and shown to us by our lovite, Mrs. Mary Ann Montgomery Jollie Devlan, otherwise Lewis, presently residing in Buccleuch place, Edinburgh, wife of John Augustus Lewis, sometime manufacturer of cut and engraved glass in Edinburgh, now farmer, and residing near Wamego, Pottawatomie county, Kansas, United States of America, or elsewhere furth of Scotland to the pursuer unknown, pursuer against the said John Augustus Lewis, her husband, defender, against whom arrestments have been used *ad fundandam jurisdictionem*, in terms of the condescendence and note of pleas in law hereunto annexed; therefore the defender ought and should be decerned and ordained by decree of the lords of our council and session to make payment to the pursuer of the sum of one hundred pounds sterling yearly, for ailment to her, payable at two terms in the year, 17th August and 17th February, by equal portions, beginning the first term of payment of said aliment as at 17th August, 1872, for the half year immediately following, and so forth half yearly thereafter during their joint lives, or until the defender adhere to the pursuer, with the lawful interest on each half years' aliment from the term of payment until payment, but under deduction of the sum of fifty pounds paid by the defender at various times between the said 17th day of August, 1872, and the 24th day of November, 1873; and, further, the said defender ought and should be decerned and ordained by decree foresaid to make payment to the pursuer of the sum of fifty pounds sterling, or such other sum as our said lords shall modify, as the expenses of the process to follow hereon conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged.

Our will is herefore, and we charge you, that on sight hereof ye pass, and in our name and authority lawfully summon, warn, and charge, the said defender, personally, or at his dwelling place, if within Scotland, and if furth thereof, by delivery of a copy hereof at the office of the keeper of the record of edictal citations, in terms of the statute thereanent, to compear before the lords of our council and session, at Edinburgh, or where they may happen to be for the time, the said defender, if within Scotland the 7th day, and if furth of Scotland the 14th day, next after the date of your citation, in the hour of cause, with continuation of days, to answer at the instance of the pursuer, in the matter libeled; that is to say, to hear and see the premises verified and proven, and decree and sentence pronounced by our said lords, or else to allege a reasonable cause in the contrary, with certification as effeirs: Attour that in the meantime ye lawfully fence and arrest all and sundry the whole readiest movable goods and gear, debts, and sums of money, and other movable effects belonging or addebted to the said defender, wherever or in whose hands soever the same may be found; all to remain under sure fence and arrestment aye, and until sufficient caution and surety be found acted in the books of council and session, that the same shall be made forthcoming to the pursuer, as accords of law, according to justice, as ye will answer to us thereupon. Which to do we commit to you, conjunctly and severally, full power by these our letters, delivering them, by you duly executed and indorsed, again to the bearer.

"Given under our signet, at Edinburgh, 24th February, 1874.

T. E. O. Horne, W. S.

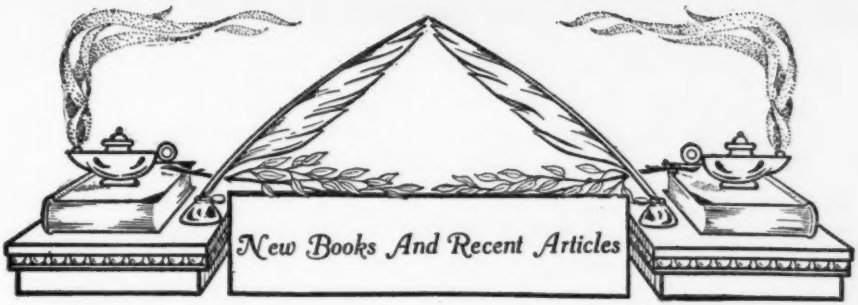
After reading the process from the Scotland court, one does not wonder that Swift caused his famous character, Gulliver, to say: "There was a society of men among us, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid. It is likewise to be observed, that this society has a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood; of right and wrong; so that it will take thirty years to decide whether the field left me by my ancestors for six generations belongs to me, or to a stranger 300 miles off."

Feræ Naturæ. In Curtis v. Dinneen, 4 Dak. 245, the action was against a wife for an assault by her servant, to wit, her husband, declared in the complaint to have been "a rough, brutal, passionate, and ferocious" servant, of which she well knowing "suffered (him) to go at large in and about her hotel or inn." Nevertheless, the wife was held not liable to one who was beaten by this "ferocious" servant running at large.

An Ominous Word. Ralph R. Bradley, a Chicago lawyer, had a client who had some differences with a farmer down state. Mr. Bradley wrote in the interest of his client on a letter head showing the address of the lawyer's firm in the Rookery. He received no reply, and was obliged, eventually, to make a trip to close the litigation. Meeting the farmer, he asked him why he had not shown him the courtesy at least to acknowledge the receipt of the letter. "Well," said the down-stater, "I noticed 'The Rookery' on your letter head and it bothered me. I am not an educated man, so I had some one look 'rookery' up. He told me it meant a den of thieves, and I concluded not to have anything to do with you."

Modern Trial by Corsned. Sir Rufus. Isaacs's first appearance in wig and gown, so he told a company of students not long after he became a K. C., was in a county court case in which he represented a fruit merchant who was being sued by a costermonger. The costermonger, who alleged that some boxes of figs he had purchased were unfit for human food, grew angry under Mr. Isaacs's cross-examination. "Look you 'ere, gov'nor," he exclaimed, "some of these 'ere figs is in this court, and if you eat three of 'em, and ain't ill in five minutes, I'll give up the bloomin' case." The county court judge thought that Mr. Isaacs ought to make the experiment, but the young advocate, resourceful then as now, suggested that it would be more fitting for his client to accept the challenge. "What will happen if I don't eat these figs?" whispered the fruit merchant. The future attorney general told him that judgment would probably be given against him. "Then, I'll lose the case," was the unhesitating reply.—Westminster Gazette.

Legal Definition of a Chinaman. New Zealand not long ago found that the Chinese were doing a very large proportion of the laundry work and had thrown out of employment the women workers in some of the laundries. In New Zealand a laundry is a factory within the meaning of the factories act, so it occurred to a lawmaker that he could settle the difficulty of this Chinese competition by a neat amendment in the interpretation clause of the act above mentioned. An amendment was therefore drafted and printed and sent with the utmost seriousness and good faith to the crown law office for consideration; it contained a provision in these words: "For the purpose of this act (the factories act), a Chinaman shall be deemed to be a girl under eighteen years of age."



"Capture in War on Land and Sea." By Hans Wehberg, Dr. Jur. With an Introduction by John M. Robertson, M. P. (P. S. King & Son, Orchard House, Westminster, London, England) 5s. net.

The right of appropriating an enemy's property for the express purpose of enriching oneself—the right of booty so called—has been from time immemorial a practical and exceptionally important part of the laws of war. Dr. Wehberg points out that our modern armaments, the maintenance of which overburdens the nations, are largely the outcome of the risks and consequent fears set up by the continuance of the principle that in naval warfare the belligerents are free to capture each other's commerce. He believes that the abandonment of booty right would result in great restriction of armaments and powerfully aid the cause of universal peace.

Dr. Wehberg has rendered a service to civilization in setting forth the situation as he has done with scholarly exactitude. We join with him in "the hope that at no very distant date, under the firm guidance of North America, the Powers will pursue the course laid down for them not only by humane considerations, but also by modern conceptions of the nature of war."

"The Panama Canal: A Story in International Law and Diplomacy." By Harmodio Arias, B. A., LL.B. (P. S. King & Son, Orchard House, Westminster, London, England.) 10s. 6d. net.

All the maritime nations have interests of transcendent value on those sea routes which, on account of their position as supplying the most convenient means of communication, may properly be called international. This is the reason why the civilized world has concentrated so much attention upon the question of the Panama canal. It remains for the jurist to ascertain what is the legal position of the canal, so that this work of civilization, being placed under the rule of law and justice, may be as productive of welfare to mankind as it is possible.

The author, in endeavoring to discover and define the legal status of the Panama canal, examines the diplomatic history of interoceanic transit; reviews the varying attitude of the United States towards the canal question, and discusses the later amplifications of the Monroe Doctrine in their bearing on isthmian transit in the New World. He has not only considered treaty stipulations, but also the broader tendencies of law as manifested in the modern intercourse of nations.

The author is a strong advocate of neutralization, but is further of the opinion that the nonbelligerent idea that forms the essential characteristic of the notion of neutralization cannot imply the suspension of the right of self-defense, and as a corollary of this, concludes that the erection of fortifications, should the Panama canal ever be fortified, cannot be said to be incompatible with its neutralization.

"Reflections of a Lawyer." By Morris Salem of the New York bar. This booklet is a plea for justice,—for better results in the administration of our laws. It does not hesitate to point out some of the faults and foibles of bench and bar, and contains valuable suggestions regarding needed reforms. It is brightly and entertainingly written, and discloses a shrewd perception of men and things. The writer doubtless voices the unspoken sentiments of many of his fellow practitioners. Copies of the pamphlet may be obtained from the author at 198 Broadway, New York city.

Scanlan's "Rules of Order." 3d ed. $.75.

Bender's "Lawyers' Diary and Directory for 1912." (New York). $3.

Crane's "Business Law for Business Men." Law buckram, $2.50. This is a special price for a limited time only.

"The Corporation Manual." 17th ed. Edited by John S. Parker. 1 vol. Law buckram, $7.

Deiser's "Conflicting Uses of Electricity and Electrolysis." 1 vol. Buckram, $2.50.

"American Form Book." By John R. Sayler and Milton Sayler. $3.50.

"Property Insurance." By Solomon S. Huebner. Cloth, $2.

Bender's "Justices' Manual." (New York). 2d ed. $7.50.

Townes's "Elementary Law." 2d ed. $4.

Morrison's "Mining Rights." 14th ed. $3.50.

"Personal Injuries." (Georgia). By John L. Hopkins. 2 vols. buckram, $12.

Gilbert's "New York Practice." 6 vols. $42.

Wait's "New York Practice." Enlarged by David Hopkins Hunt. 2d ed. 6 vols. Buckram, $42.

"The Constitutions of Ohio, Amendments, and Proposed Amendments." By Isaac Franklin Patterson. Cloth, $3.

"Rules of Court of Pennsylvania." Arranged by A. B. Weimer. 1 vol. Buckram, $2.

Booth on "Street Railways." 2d ed. 1 vol. Buckram, $6.50.

Frost on "Federal Corporation Tax Law." Buckram, $4.

Andrew's "Transfer Tax Law of New York." Annotated and with Appropriate Forms. 1 vol. $6.50 delivered.

"Texas Criminal Appeals Reports." Vol. 60. $2.50.

Recent Articles of Interest to Lawyers

Accord and Satisfaction.

"Accord and Satisfaction."—33 Australian Law Times, 25.

Arbitration.

"Legal Limitation of Arbitral Tribunals."—60 University of Pennsylvania Law Review, 153.

Attorneys.

"The Lawyer in Politics."—4 Lawyer and Banker, 412.

"Solicitor's 'Lien' for Costs."—33 Australian Law Times, 26.

Biography.

"Peter S. Grosscup."—The Fra, December, 1911, p. 70.

"John Marshall Harlan."—17 Virginia Law Register, 497.

"Walt Whitman's Estimate of Well-known Men."—The Century, December, 1911, p. 250.

"Woodrow Wilson: A Biography."—The World's Work, December, 1911, p. 229.

"Woodrow Wilson: Political Leaders."—McClure's Magazine, December, 1911, p. 217.

Carrying Weapons.

"Some Constitutional Queries Suggested by the Recent Weapons Law."—27 Bench and Bar, 70.

Civil War.

"Private and Official Papers of Jefferson Davis."—Harper's Magazine, December, 1911, p. 97.

Commercial Law League.

"The Past and Future of the Commercial Law League of America."—44 Chicago Legal News, 99.

Constitutional Law.

"Constitutional Guaranties against Encroachments by Congress."—4 Lawyer and Banker, 403.

"Due Process of Law."—43 National Corporation Reporter, 497.

Courts.

"Jurisdiction of Federal Courts."—4 Lawyer and Banker, 384.

"Amendments to Rules of Supreme Court of the United States."—44 Chicago Legal News, 99.

"Revision of the Federal Equity Rules—Suggestions of the Committee Appointed by the Circuit Court of Appeals for the Eighth Circuit."—73 Central Law Journal, 371.

"The Future of the London Quarter Sessions."—75 Justice of the Peace, 554.

Criminal Law.

"Criminal Statistics in the United States."—2 Journal of Criminal Law and Criminology, 568.

"Insanity and Criminal Responsibility."—2 Journal of Criminal Law and Criminology, 521.

"The Treatment of Aliens in the Criminal Courts."—2 Journal of Criminal Law and Criminology, 554.

"Crime and Immigration."—2 Journal of Criminal Law and Criminology, 546.

Divorce.

"Residence in Divorce Proceedings."—73 Central Law Journal, 394.

"Divorce and Moral Health."—The Fra, December, 1911, p. 91.

Drains and Sewers.

"'Combined Drains' in the Metropolis."—75 Justice of the Peace, 542.

Economics.

"Economics Pressure and Its Inevitable Results."—McClure's Magazine, December, 1911, p. 232.

Elections.

"Some Legal Aspects of the Canadian Election."—15 Law Notes, 145.

Equity.

"Revision of the Federal Equity Rules—Report of Committee Appointed for the Sixth Federal Circuit."—73 Central Law Journal, 354.

Foreign Relations.

"Dollar Diplomacy."—Everybody's Magazine, December, 1911, p. 756.

Gaming.

"Whist Drives."—75 Justice of the Peace, 553.

Good Citizenship.

"Applied Good Citizenship."—The Outlook, November, 1911, p. 610.

Historical.

"In the Haunts of Jean Lafitte."—Harper's Magazine, December, 1911, p. 80.

Habeas Corpus.

"Habeas Corpus."—4 Lawyer and Banker, 361.

Highways.

"The Effect of Making up a street upon Ratione Tenuræ Liability to Repair."—75 Justice of the Peace, 518.

"Fire Engines on Highways."—75 Justice of the Peace, 507.

"The Naming of Streets."—75 Justice of the Peace, 517.

Homicide.

"Assassins of Rulers."—2 Journal of Criminal Law and Criminology, 505.

Judgment.

"Extra-Territorial Effect of Decree for Divorce on Constructive Service."—17 Virginia Law Register, 577.

Landlord and Tenant.

"Dangerous Structures and Covenants to Repair."—75 Justice of the Peace, 530.

Larceny.

"Larceny by a Trick."—33 Australian Law Times, 27.

Law.

"Humanity of the Law."—73 Central Law Journal, 335.

License.

"Monopoly Value Problems."—75 Justice of the Peace, 529.

Lynching.

"Lynching and the Miscarriage of Justice."—The Outlook, November, 1911, p. 706.

Master and Servant.

"Workmen's Compensation Laws."—44 Chicago Legal News, 102.

"The Workmen's Compensation Act."—43 National Corporation Reporter, 429.

Maxims.

"Verba Fortius Accipiuntur Contra Proferentem."—43 Chicago Legal News, 119.

Monopoly.

"About the Trusts."—The Era, December, 1911, p. 96.

"The Trusts, the People, and the Square Deal."—The Outlook, November, 1911, p. 649.

"Mr. Roosevelt and the Trusts."—43 National Corporation Reporter, 497.

Municipal Corporations.

"Legal Aspect of Municipal Esthetics."—18 Case and Comment, 357.

"Commission Government of Cities."—18 Case and Comment, 366.

"Municipal Ownership of Public Utilities."—18 Case and Comment, 373.

"Municipal Socialism."—18 Case and Comment, 378.

"Suggestions for Municipal Government."—18 Case and Comment, 385.

"Legal Aspects of the Plan of Chicago."—18 Case and Comment, 391.

Peace.

"World Peace and the General Arbitration Treaties."—The World's Work, December, 1911, p. 143.

"Recent International Events and 'The Great Illusion.'"—The World's Work, December, 1911, p. 149.

"The World's Peace in the Making."—The World's Work, December, 1911, p. 155.

Philippines.

"The New Manila."—The Century, December, 1911, p. 237.

Poor and Poor Laws.

"The Boarding-Out Order, 1911."—75 Justice of the Peace, 505.

Practice and Procedure.

"The Reform of Procedure."—73 Central Law Journal, 394.

Recall.

"Recall of Judges."—44 Chicago Legal News, 106.

Roman Law.

"The Value of Roman Law to the American Lawyer of To-day."—60 University of Pennsylvania Law Review, 194.

Sale.

"Sales of Personal Property."—27 Bench and Bar, 59.

Set-off.

"Set-Off against Wages under the Employers and Workmen Act, 1875."—75 Justice of the Peace, 541.

Statutes.

"The New Federal Judicial Code."—44 Chicago Legal News, 103.

Tariff Revision.

"The Setting Hens: What Will the Tariff Board Hatch."—Everybody's Magazine, December, 1911, p. 802.

Trial.

"The Trial of Cases in Pennsylvania."—60 University of Pennsylvania Law Review, 181.

Tripoli.

"The Taking of Tripoli."—The World's Work, December, 1911, p. 165.

Uniform Legislation.

"Commission on Uniform State Laws — What the Twenty-First Annual Conference Accomplished."—73 Central Law Journal, 358.

Four Illustrious Names in English Legal History, Coke, Hale, Mansfield, Hardwicke

SIR Edward Coke was a handsome man. "The jewel of his mind," as Lloyd quaintly says, "was put in a fair case,—a beautiful body with a comely countenance."

Never had the law a more industrious apprentice. "Every morning," as Lord Campbell relates, "he rose at three, in the winter season lighting his own fire. He read Bracton, Littleton, the Year Books, and the folio Abridgments of the Law, till the court met at eight. He then went by water to Westminster and heard cases argued till twelve, when pleas ceased for dinner. After a short repast in the Inner Temple Hall, he attended 'readings' or lectures in the afternoon, and then resumed his private studies till five or supper time. This meal being ended, the moots took place, when difficult questions of law were proposed and discussed,—if the weather was fine, in the garden by the riverside; if it rained, in the covered walks near the Temple Church. Finally, he shut himself up in his chamber and worked at his commonplace book, in which he inserted under the proper heads all the legal information he had collected during the day. When 9 o'clock struck, he retired to bed, that he might have an equal portion of sleep before and after midnight."

Shakespeare had come to London to try his fortunes at the Globe Theatre, just as Coke was rising at the bar; for over thirty years the great lawyer and the great dramatist were living within almost a stone's throw of each other. Yet not a word or line of Coke's discovers him sensible of the creations of that marvelous mind; of the fairyland of Edmund Spenser; of Herrick's graceful lyrics; Ben Jonson's learned humors, or the rising star of Milton. To him they were "merely players," if not vagrants or "rhyming poets," foredoomed to "misery and poverty."

"Was not Lord Coke a mere lawyer?" asked Sir A. Macdonald of Jonson. "Why, I am afraid he was," said Jonson, "but if you had told him so, he would have prosecuted you for scandal."

In Coke's first cause he defended a vicar who had charged Lord Cromwell with upholding preachers "who maintain sedition against the Queen's proceedings." By various ingenious technicalities,—more admired in those days than arguments of reason,—he brought his client off safe. But his most notable achievement at this time was his argument in Shelley's Case, which made the law in that celebrated real property controversy,—a case neatly summed up in Coke's Reports in Verse thus:

> "When ancestors a freehold take,
> The words, his heirs, a limitation make."

To the lawyer this is enough,—*verbum sapienti;* to the layman Shelley's Case must always remain a fearful and wonderful mystery, and he must be content to venerate where he cannot comprehend.

King James once, in an outburst of petulance, declared Coke to be "the fittest

instrument for a tyrant that ever was in England." Coke had that highly technical knowledge of law which could easily wrest it, in unscrupulous hands, to injustice; his temper was overbearing and masterful, and these qualities enabled him to secure convictions in nearly all the state prosecutions in which he was engaged. But Coke's attorney-generalship is the part of his career on which it is least pleasant to dwell. On his appointment to the office, his old friend Whitgift—then Archbishop of Canterbury—sent him a new Greek Testament, with a message "that he had studied the common law long enough, and that he should thereafter study the law of God;" and well would it have been if he had taken some of the lessons of that Book to guide him in the discharge of his duties; we might then have been spared the disgraceful scenes at the trials of Lord Essex, Sir Walter Raleigh, and Sir Everard Digby, one of the plotters in the Gunpowder Treason.

A most artful insinuation of the prerogative was suggested to King James by Archbishop Bancroft, who urged that the King might judge whatever cause he pleaded in his own person, free from all risk of prohibition or appeal. The idea took the King's fancy, and he summoned all the judges to Whitehall to know what they had to say against it.

King James: "My Lords, I always thought, and, by my soul, I have often heard the boast, that your English law was founded upon reason. If that be so, why have not I and others reason as well as you, the judges?"

Chief Justice Coke: "True it is, please your Majesty, that God has endowed your Majesty with excellent science as well as great gifts of nature, but your Majesty will allow me to say, with all reverence, that you are not learned in the laws of this your realm of England, and I crave leave to remind your Majesty that causes which concern the life or inheritance, or goods or fortunes, of your subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it. The law is the golden metewand and measure to try the causes of your Majesty's subjects, and it is by the law that your Majesty is protected in safety and peace."

King James (in a great rage): "Then I am to be under the law,—which it is treason to affirm."

Chief Justice Coke: "Thus wrote Bracton: 'Rex non debet esse sub homine, sed sub Deo et Lege.'"

James, it is said, tried his hand at being a judge, but had to give it up. "I could get on very well," he remarked, "hearing one side only, but when both sides have been heard, by my soul, I know not which is right."

This firm resistance of Coke to arbitrary measures naturally incensed the King. When Coke later flouted the chancellor's jurisdiction over common-law actions, he was dismissed from the chief justiceship by supersedeas, on the 19th November, 1616.

The role of patriot which Coke adopted next had little tendency to restore his fortunes. It led him, in fact, to the Tower. Until his death, in 1634, at the age of eighty-five, we see him as the protagonist of the Parliamentary party, nobly vindicating our constitutional liberties, and employing all his great legal learning and Parliamentary authority to resist the forced loans, imprisonment, billeting of soldiers, ship money, and other tyrannical acts by which Charles was preparing the way for the Civil War.

His Institutes and Reports are enduring memorials of his labors and wisdom. Crabbed in style, chaotic in arrangement, often pedantic, he is yet the chief oracle of our common law, unique in authority, profound in learning, discriminating in judgment.

Sir Matthew Hale

CHIEF Justice Hale has always been accepted as the type of the wise and just judge. "Good" was the epithet which, Anthony Wood says, "the great men of law" used to bestow on him, and it has a very real significance; for just as all law rests on a moral basis, so we require in the law's authorized interpreters not so much brilliancy or acuteness or eloquence, as that moral character

which alone gives an insight into the law's true end and operation,—the common weal. He was a conspicuous refutation of the old monkish saying, *Bonus jurista, malus Christa.*

He was reared by a Puritan kinsman. The Reign of the Saints, as we all know from Macauley, begat the license of the Restoration. Youth is not to be confined always in a Puritanic strait waistcoat; nor was Hale's. While he was at Magdalen College, Oxford, some stage players visited the city. Young Hale was greatly taken with them, and forsook his studies for the theater; and, as one "sin," as his Puritan kinsmen would have called it, draws on another, he soon ruffled out in fine clothes as the complete gallant, took delight in gay company and other vanities, and spent much of his time in bodily exercises, in which his strength and activity well qualified him to excel,—particularly in fencing.

Arms, not the toga, were in fact Hale's ambition at this time,—lawyers he thought of only as a "barbarous sort of people, unfit for anything but their own trade,"—and he was on the point of starting to join a friend who was with the army in the Low Countries, and "trail a pike" there, when an accident—or what we call an accident—changed the whole current of his life.

A lawsuit was pending touching some of his property, and Hale went to London to consult his counsel, the learned Sergeant Glanvil, about it. At this interview Glanvil observed in his young client such a clear apprehension of things, and so solid a judgment,—such a fitness in fact for the law,—that he took pains to persuade him to study the law, and, happily, prevailed.

An excess of scrupulosity on Hale's part was like to have marred his prospects at the outset of his professional career, for as Bishop Burnet tells us, "if he saw a cause was unjust, he for a great while would not meddle further in it but to give his advice that it was so; if the parties after that were to go on, they were to seek another counsellor, for he would assist none in acts of injustice." There was "no greater dishonor," he said, "than for a man to be hired for a little money to say otherwise than he thought;" but afterwards, adds Burnet, he abated much of the scrupulosity he had about causes that appeared at first view unjust, —that is to say, he realized, as Dr. Johnson with his usual sound sense points out, that it is not for the advocate to usurp the functions of the judge.

When the storm of Civil War was gathering, Hale had been reading the life of Atticus and how that cultured friend of Cicero lived through the wars of Marius and Sulla free from danger and favored by all; and he resolved to make him his pattern by keeping clear of all faction and cultivating a strict neutrality. Whether this was quite the spirit of the true patriot may perhaps be doubted, but it succeeded so far that Hale commanded the confidence of both parties.

On the Restoration Hale was made chief baron, Lord Clarendon saying handsomely "that if the King could have found an honester and fitter man for that employment, he would not have advanced him to it,—that he had therefore preferred him because he knew none that deserved it so well."

For eleven years he remained chief baron, till on the death of Kelynge, in 1672, he was promoted to the chief justiceship. In both these great offices he won golden opinions from lawyers and laymen alike, not only as a most able and upright judge and the most profound lawyer of his time, but as an enlightened jurist, with an appreciation, rare among English lawyers, of the civil law, with reference to which he said that the true grounds and reasons of the law were so well delivered in the Digests that a man could never understand law as a science so well as by seeking it there, and he lamented that it was so little studied in England.

Here are a few of the rules he laid down for himself as a judge,—"things necessary," as he says, "to be continually had in remembrance:"

"That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard."

"That in business capital, though my nature prompt me to pity, yet to consider

SIR EDWARD COKE

Lord Chief Justice of the king's Bench 1613-1616 (From the origin by Jansen in the Hall of the Inner Temple)

SIR MATTHEW HALE

Lord Chief Justice of the Kings Bench 1671-1676 (From the original the Library of the Honourable Society of Lincoln's Inn)

that there is also a pity due to the country."

"Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rules of justice."

"If in criminals it be a measuring cast, to incline to mercy and acquittal."

"To abhor all private solicitations of what kind soever and by whomsoever in matters depending."

Nor were these rules mere counsels of perfection. Hale lived up to them.

After John Bunyan's imprisonment in Bedford jail as an unlicensed preacher, his wife presented a petition to Hale when he came round on the assizes, which he received very kindly at her hand, telling her "that he would do her and me"—it is Bunyan who tells the story in his Grace Abounding in the Chief of Sinners—"the best good he could, but he feared, he said, he could do none." She sought him again in the Swan Chamber, where the two judges and many justices and gentry of the country were in company together. She then, coming into the chamber with abashed face and a trembling heart, began her errand to them in this manner:

"My lord," directing herself to Judge Hale, "I make bold to come once again to your Lordship to know what may be done with my husband." To whom he said: "Woman, I told thee before I could do thee no good, because they have taken that for a conviction which thy husband spoke at the sessions, and, unless there be something done to undo that, I can do thee no good."

"My lord," said she, "he is kept unlawfully in prison. They clapped him up before there was any proclamation against the meetings. They never asked him whether he was guilty or no; neither did he confess the indictment."

Then one of the justices that stood by said: "My lord, he was lawfully convicted."

"It is false," said she, "for when they said to him, 'Do you confess the indictment?' he said only this, that he had been at several meetings both where there were preaching the Word and prayer, and that they had God's presence among them."

Whereat Judge Twisden answered very angrily, saying: "What, you think we can do what we list? Your husband is a breaker of the peace, and is convict-

WILLIAM MURRAY, First Earl of Mansfield.
Lord Chief Justice of the king's Bench 1756-1788 (From the original by Sir Joshua Reynolds in the collection of the Right Honourable Earl of Mansfield

PHILIP YORKE, First Earl of Hardwicke
Lord Chancellor 1737-1756 (From the original by Ramsay in the collection of the Right Honourable the Earl of Hardwicke)

ed by the law. Will your husband leave preaching? If he will do so, then send for him."

"My lord," said she, "he dares not leave preaching so long as he can speak. He desires to live peaceably and to follow his calling, that his family may be maintained; and, my lord, I have four small children that cannot keep themselves, one of which is blind, and we have nothing to live upon but the charity of good people."

"Alas, poor woman," said Hale, "thou hast four children? I am sorry I can do thee no good. They have taken what thy husband spake for a conviction. Thou must do one of three things, either apply thyself to the King, or sue out his pardon, or get a writ of error; but a writ of error will be cheapest." It was all that kind-hearted chief justice could do, but nothing followed. Bunyan would not, could not, consent to give up his preaching, and for twelve years he remained a prisoner, supporting his family by making boot laces; but good comes out of evil, for it was in prison—"in the wilderness of this world"—that Bunyan dreamed that wohderful dream of the Pilgrim's Progress, the finest, because the most real, allegory ever written, not excepting the Faery Queen.

One of the deplorable episodes in the judicial career of Sir Matthew Hale is his trial of the so-called witches, Rose Cullender and Amy Duny, at the Bury St. Edmunds assizes in 1665. These two poor old women were charged with having bewitched several children in the village, who complained of the pricking of pins in their bodies, fell into convulsions, and cried out upon the witches. The whole evidence was of the most trumpery and ridiculous description, as we should think now, but it was solemnly received and believed.

LORD MANSFIELD

WHEN little William Murray, at the age of fourteen, said farewell to his father's — Viscount Stormont — ruined castle of Scone, and galloped his pony over the Border *en route* for Westminster school, he little imagined that he was to become the most famous of Eng-

land's chief justices, but he meant, this braw Scotch laddie, to achieve greatness, it is pretty certain, in some form or another.

While still at school he had often looked in at the law courts, seen and heard the judges, and admired the great lawyers and advocates of the day, and felt, as he describes it, "a calling for the profession of the law."

With no guide or counselor to aid him, —for Blackstone's Commentaries as yet were not,—he laid down for himself an admirable plan of education. Recognizing that history and ethics are the foundation of all law, he read widely in both. From these he went on to the Roman civil law, then to international law, then to feudal law, as the key to the law of real property, and finally he attacked the common law of England; but he was not so enamored of it as the perfection of common sense, as not to seek for side lights from the Codes of foreign countries. Such an equipment of knowledge in a barrister was rare indeed at the time, but Murray added to it something still more rare,—accomplished oratory.

Without in any way disparaging his merits as a lawyer, it is clear that what he really owed his rapid successes at the bar and in Parliament to was his excellence as a speaker.

It is one of life's ironies that it should have fallen to the lot of Murray, a scion of one of the stanchest Jacobite families, to be the protagonist in the historic trial that followed on the Young Pretender's ill-starred attempt in 1745. His (Murray's) own brother, the Earl of Dunbar, was the prince's chief military adviser, and might well have figured among the "rebels" at the bar.

In 1756, at the age of fifty-one, and in the maturity of his powers, he was appointed chief justice with a peerage. How splendidly he discharged the duties of his high office; what signal services he rendered to English law, and to our commercial law in particular, is attested by a cloud of witnesses from Mr. Justice Buller to Lord Campbell.

"His ideas," said Burke, "go to the melioration of the law by making his liberality keep pace with the demands of justice and the actual concerns of the world, not restricting the infinitely diversified occasions of men and the rules of natural justice within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce and our Empire."

This large mindedness shines through all Lord Mansfield's judicial life, but more particularly in the sphere of our commercial law, of which, as Mr. Justice Buller says in Lickbarrow v. Mason, he "may truly be said to have been the founder." Down to his day all the evidence in mercantile cases was thrown together and left indiscriminately to the jury. Such a method produced no general principles to serve as guides for the future. Lord Mansfield trained and attached to himself a select body of special jurors regularly impaneled at Guildhall for mercantile cases, and from these mercantile assessors, as they may be properly called, he learnt the usages of trade, and formulated them into legal principles of mercantile law. In doing so he was only following the mode by which the common law of England has been made, that is to say, by the judges' sanction to those general customs of the realm which people had themselves found out to be reasonable and convenient. This is the living law of a people, not superimposed from without, but growing out of the genius and habits of the people themselves and the instinctive sense of justice.

LORD HARDWICKE

"LORD HARDWICKE," says Lord Chesterfield, "was perhaps the greatest magistrate this country ever had. . . . In the lives of too many men who have achieved greatness we have to lament something which impairs the pleasing effect of the picture. It may be the corruption of a Bacon, the narrow-minded pedantry of a Coke, the cold-heartedness of a Mansfield, or the self-seeking of a Campbell; but Detraction itself can find nothing upon which to fasten in the case of Lord Hardwicke. He won his way to the highest places in the state with the good will and applause of all, and, dying, left no blot on his escutcheon."

Throughout his life he possessed in a

peculiar degree the power of conciliating favor. He was, to begin with, one of the handsomest men of his time,—even at seventy-three he still looked young; and he had a natural amiability and engaging address,—the same charm of manner which Lord Chesterfield notes as a secret of the great Duke of Marlborough's success in life.

Philip Yorke, the future Lord Hardwicke, early acquired a good practice at the bar. He never knew the torments of the briefless,—"the long, dark days of nothingness."

He became solicitor general at twenty-nine, when he had been only four years at the bar. It was a record in promotion, and naturally produced some heart-burnings among the older members of the profession; but Yorke's modesty and conciliatory manners enabled him to live it down.

As solicitor general and afterwards as attorney general, he had to deal with a number of interesting cases, both civil and criminal. Among the latter were those heroes of our boyhood,—Jack Sheppard and Jonathan Wild.

In 1733 he became lord chief justice of the King's bench, and in 1736, on the death of Chancellor Talbot, he succeeded to the Woolsack.

No such brilliant cavalcade as that which accompanied him from his house to Westminster had paid its compliments to any chancellor since Bacon's time, and it seemed to mark with a prophetic reverence the momentous epoch of our judicial annals which was being inaugurated; for in that chancery court Lord Hardwicke was destined to preside for more than twenty years, to bring light and order out of the chaos of equity, and to build himself an everlasting name.

Lord Hardwicke had acquired a small estate—Hardwicke Court—in Gloucestershire, from which he had taken his title, but as his wealth and honors increased he wished for a more splendid seat,—a territorial status,—and he found it in Wimpole, one of the "stately homes of England." Wimpole, which had belonged to Lord Oxford, is about 9 miles southwest of Cambridge, and is a spacious brick and stone mansion with wings, occupying an area of 2 acres. It has a fine gallery in the Italian style, and a valuable collection of pictures by old masters.

Here Lord Hardwicke sought refreshment in the intervals of his arduous labors, and it was to this haven of rest that he withdrew when he laid down the burden of office,—a pleasing picture of "retired leisure that within gardens takes his pleasure."

"Here I am," he exclaims, " 'the world forgetting, by the world forgot,' as Pope says, and so I desire to be,—I mean by the world of parties and politics."

The biographical facts stated in the preceding sketches are collated from articles which have appeared in recent years in the London Law Times.

"For thy comfort and encouragement cast thine eyes upon the sages of the law that have been before thee."—Coke

Judah P. Benjamin

A Leader at the Bar of Two Nations

By Mr. H. N. ATKINSON
of the Houston, Tex., Bar

Portrait
From "Great American Lawyers"

A garland for the grave of him, thy son,
Who sleeps in that fair city by the Seine,
Our Southland's off'ring, on this page, I bring.
He wrought for her, in that sword-mangled time,
When all her vines bore fruit of wounds and death,
Her tears of grief made bitter harvestings,
And she the cruel wine press trod alone.

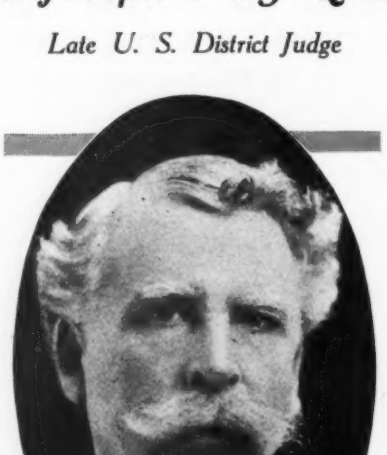
His story thrills across the workday world
As wild romance, told in Arabian Nights.
As great in counsel as was Lee in fight,
His was the arm on which our Davis leaned,
From that bright day that hid Fate's stern decree,
When Sumter's wall through cannon smoke was dim,
To that dark hour that saw a nation die,
When Appomattox sheathed a stainless sword.

And when the high-borne stars and bars went down,
Never again to float o'er field or flood,
Scorning to dwell beneath the victor's flag,
His free soul, ranging masterless, went forth,
From exile into exile, old and poor,
To win new fortunes 'mid the London throngs,
And added fame, to crown his crown of fame.

Hon. Joseph Very Quarles

Late U. S. District Judge

IN the death of Judge Quarles, on October 7, last, Wisconsin lost one of its most efficient and ablest jurists and statesmen. In public life his courtly bearing and eloquent address placed him in high rank as an orator. As United States district judge for the eastern district of Wisconsin, he showed his clear insight in the intricacies of the law. As United States Senator from Wisconsin, he served the state with distinction.



HON JOSEPH VERY QUARLES

He was born at Kenosha, Dec. 16, 1843. At the age of seventeen he enlisted in the Union army and served during the entire war. After leaving the army he went to the University of Michigan, and was graduated in 1866, returning to Kenosha, where he studied law in the office of O. S. Head, at that time one of the leading lawyers in the state. Upon his admission to the bar in 1868, he formed a partnership with Mr. Head, under the firm name of Head & Quarles. This partnership terminated with the death of Mr. Head in 1875.

Elected to the lower house of the Wisconsin legislature of 1878, and to the state senate of 1880-81, he sprang into prominence, and formed political friendships which lasted to the end of his career.

Removing to Racine he formed a partnership with John B. Winslow, which continued until the latter was elected judge in the first circuit. He then formed partnerships in turn with J. R. Dyer and T. W. Spence. Then the firm of Quarles, Spence, & Quarles was formed, and the firm moved to Milwaukee in 1888.

The next ten years proved Mr. Quarles to be one of the foremost lawyers in the state. As head of the firm of Quarles, Spence, & Quarles, which at once established itself as one of the leading law firms of the city, Mr. Quarles assumed a leading place at the bar. He tried some of the most noted cases in Wisconsin.

His love for his profession led him for many years to turn a deaf ear to the alluring call to public office, but in the second year of McKinley's administration he succumbed to a pressure which had been frequently exerted, became a candidate for the United States Senate, and was elected under circumstances which must have been highly flattering to his pride. He made in that distinguished body an honorable record, and at the conclusion of his term was appointed judge of the United States district court for the eastern district of Wisconsin, in which position he served till his death.

Judge Quarles was a man of splendid abilities, of scholarly instincts and attainments, and of high ideals and principles.

Ohio's Attorney General

HON. T. S. HOGAN

ALTHOUGH Ohio has biennial elections for Attorney General, that state, prior to the present year, has had only two Democratic Attorney Generals since the Civil War, Isaiah Pillars, in 1878, and James Lawrence, in 1884. Now, as everyone knows, it has another. Timothy S. Hogan was born in Washington township, Jackson county, Ohio, on June 11th, 1864, and is consequently forty-seven years old. He was educated, or rather, educated himself, in the common schools of Jackson county. He then attended Ohio University at Athens, Ohio, from which he was graduated. He has since received his M. A. degree from that University. Mr. Hogan taught school from 1881 to 1895; during the last eight years of this period he was superintendent of the public schools at Wellston, Ohio. While teaching school he studied law, and was admitted to the bar of Ohio in 1894, opening an office at Wellston, he practised there until January, 1911, when he came to Columbus to assume his duties as Attorney General.

In private practice, Mr. Hogan was extraordinarily successful; he was a hard worker, of a nature that implied confidence, and a masterful speaker, especially to a jury; he soon became recognized as one of the most formidable advocates at the bar, and his practice extended over Ohio and widely into West Virginia, where he became almost as well known as on his own side of the Ohio river.

With his wide acquaintance and great reputation as a lawyer, the nomination as Attorney General came to him unsought in 1908. Unfortunately, that was presidential year, and, as Ohio has a habit of going Republican on such occasions (unless one of her own sons heads the presidential ticket), Mr. Hogan was defeated with the majority of his ticket. His successful opponent was U. G. Denman. Mr. Denman made an excellent record, and, as he was the strongest man on the Republican ticket in 1910, and as Ohio is considered as a reliable Republican state, the election of Denman was considered a certainty. Mr. Hogan was against the choice of his party. He made a most energetic campaign, and when the election was over and the ballots counted it was found that he had been elected by a majority of 8,000.

It is safe to say that no other Attorney General of Ohio ever had such a strenuous time at the very beginning of his term as did Mr. Hogan. When he had taken the oath of office and received the congratulations of his friends, the first official document handed him was a letter from the auditor of state, requesting an immediate opinion as to the legality of the session of the Ohio legislature, which had opened the preceding week; he was, at the same time, informed by the press that many of the ablest lawyers in the state had expressed deliberate opinions that the session was irregular, and not authorized by the Constitution. If the session were not legal the election of Mr. Pomereme as United States Senator would probably be invalidated, urgent laws could not be passed, appropriations made would be void, no further appropriations could be made, the wherewithal to use the machinery would be nonexistent, and there would be chaos in general. The Attorney General worked all day and night on the question, and then announced his opinion that the session was regular and legal. His opinion was at once attacked by a suit in the Ohio supreme court. Mr. Hogan argued the case personally, and opposed to him were John H. Clark and James R. Garfield, two of the strongest lawyers in Ohio; the court, by an unanimous decision, affirmed the opinion of the Attorney General.

Within a few days he was again called upon for an opinion as to the constitu-

tionality of the bribery statute, acting under which Judge A. Z. Blair had been busily and rapidly reducing the list of electors in Adams county. Mr. Hogan again rendered an opinion that the statute in question was undoubtedly constitutional. Again the attack was promptly made by way of a suit in the Ohio supreme court, and again that court decided forcibly and unanimously that the Attorney General was correct.

These two cases, raising questions about which the best lawyers in the state expressed contrary opinions, coming at the very beginning of his term, and being cases watched with eager interest throughout Ohio, and generally throughout the United States, put the new Attorney General to the test before all the people. His opinions were upheld in both instances. He fearlessly and energetically investigated and prosecuted the "graft cases," involving members of the Ohio legislature.

The Attorney General of Ohio is the legal adviser of all officials of Ohio, from justice of the peace to the governor. And, although Mr. Hogan has been in office but nine months, he has given out more opinions than has ever gone out of the Attorney General's office in the space of a year. Requests for opinions come in in ever-increasing flood. They come from every source, law libraries, colleges, United States Senators and representatives, and without number from state, county, and city officials. So great has been the number of requests that it has been a physical impossibility for the Attorney General, working night and day, and with an office force of eight lawyers, to keep abreast with the work. Every question sent to the Attorney General is one that has given some lawyer trouble, that is, it is a doubtful question. Mr. Hogan never sends out an opinion that has not been approved by three, at least, of his office force, and finally by himself.

In addition to the work referred to, there has been an unusual amount of litigation all over the state requiring the appearance of the Attorney General. New suits are being brought constantly, and old ones tried. The Smith 1 per cent tax law, Governor Harmon's favorite measure, and the best tax law ever enacted in Ohio and probably in the Union, is being assailed in every conceivable manner and in many courts at the same time. The Attorney General is meeting these attacks promptly and wherever made, and thus far successfully. Practically every progressive law enacted by the law legislature is being tested by suit, and upon the Attorney General, in addition to explaining the meaning of these laws, is cast the duty of sustaining them. He also defends all suits brought against state officials, boards, or institutions, collects taxes from all delinquent corporations, brings quo warranto to oust refractory and illegal corporations, prosecutes criminal cases throughout the state upon the request of the governor, brings appropriation suits for property required by any state board or institution for public purposes, prosecutes violations of the fish and game laws, workshop, and factory laws, and many other laws; and, in addition, is in constant demand by his constitutents all over the state for a speech upon every conceivable occasion.

Justice Grantham.

Sir William Grantham, judge of the King's bench division of the high court of justice, died in London November 30, of pneumonia. He was born in October, 1835, and studied at King's College School. He was called to the bar in 1863, and "took silk" in 1877. In 1874, he was returned to Parliament as Conservative member of the county of East Surrey, which he represented until 1885. In the same year he was elected member for East Croydon, but retired from political life in January, 1886, on his appointment as judge. Since that time, he has been one of the most prominent members of the British judiciary.

"Care to our coffin adds a nail, no doubt
And every grin so merry, draws one out."—Dr. Wolcot

A Careful Policeman. A motorist was stopped by a policeman, the light on the car being insufficient.

He gave his card to the constable.

"G. J. Smith," read the man in blue. "Go on with you," he exclaimed. "I want your proper name and address. We've too many Smiths about here. Now, look sharp!"

"Then," said the motorist, "if you must have it, it's William Shakespeare, Stratford-on-Avon!"

"Thank you, sir," replied the policeman. "Sorry to have troubled you!"

And he carefully entered the particulars in his book.—Tit-Bits.

Why Mike Persisted. An Irishman named Michael Docherty, having been discovered after solemnizing nuptials with four wives, says Life, was brought up before the Dublin assizes charged with bigamy. The judge, in passing sentence, expressed his wonder that the prisoner should be such a hardened villain as to delude so many women, whereupon Mike said, apologetically:

"Sure, your Honor, I was only tryin' to get a good one,—an' it's not aisy."

The High Cost of Living. "The duke," said that nobleman's solicitor, "expresses his love, and suggests that the young lady arrange for a settlement of a million dollars on his lordship."

"Expresses his love C. O. D., eh?" interposed the attorney for the heiress.—Louisville Courier-Journal.

'Nuff Sed. "You are charged," said the magistrate, "with talking back at an officer. Have you anything to say?" "Dayvil a word, your honor," replied the culprit. "Oi've said too much already."—Life.

A Bad Witness. A small Scottish boy was summoned to give evidence against his father, who was accused of making disturbances on the street. Said the magistrate to him:

"Come, my wee mon, speak the truth, and let us know all ye ken about this affair."

"Weel, sir," said the lad, "d'ye ken Inverness street?"

"I do, laddie," replied his worship.

"Weel, ye gang along it, and turn into the square, and cross the square—"

"Yes, yes," said the judge, encouragingly.

"An' when ye gang across the square ye turn to the right, and up into High street, an' keep on up High street till ye come to a pump."

"Quite right, my lad; proceed," said his worship. "I know the old pump well."

"Weel," said the boy, with the most infantile simplicity, "ye may gang an' pump it, for ye'll no pump me."—Ideas.

Judge Took Both Sides. A remarkably brief and effective summing up was once quoted by Lord James in an afternoon speech.

It was delivered by an Irish judge trying a man for pig stealing. The evidence of his guilt was conclusive, but the prisoner insisted on calling a number of witnesses, who testified most emphatically to his general good character.

After hearing their evidence and the counsel's speeches, the judge remarked: "Gentlemen of the jury, I think that the only conclusion you can arrive at is that the pig was stolen by the prisoner, and that he is the most amiable man in the country."—London Chronicle.

What He Would Do. He was a huge man of the navvy species, and as he stood in the witness box counsel eyed him dubiously. He knew he would be a hard nut to crack,—a very hard nut, indeed.

"What we want to get at," he began, "is who was the aggressor."

"Eh?" said the witness, puzzled.

"Let me illustrate my meaning," said counsel. "Supposing that I should meet you in the street and strike you in the face. I would be the aggressor."

"You'd be a fool!" said the witness, with growing emphasis.

"No—no!" said counsel, with heightened color. "I was speaking only in abstract. Suppose we met, and without provocation I struck you, I should be committing an act of aggression."

The navvy hunched his huge shoulders.

"You'd be committing suicide, mister," he remarked grimly.

"You may sit down!" snapped counsel. —London Answers.

Wanted The Documents. Commissioner-General of Immigration Keefe was hearing the case of a woman who appealed to enter this country notwithstanding serious charges had been brought against her morality.

Her attorney pleaded that she might do better if allowed to start on a new life here. "Look at the case of Mary Magdalene," he said. "See what was done in her case. Why cannot the same be done in the case of this woman?"

Mr. Keefe had been preoccupied. He called to the clerk and said: "Get me the record in that Magdalene case."—New York World.

The Price of Power. Counsel: Then you got seven-and-sixpence for the job, and paid another man eight shillings to do it for you? And so you lost sixpence on the transaction! Witness: Well, ain't it worth sixpence to be boss?

Slanguage. "Chee," said Mack the Mick, as he disembarked from the second cabin gangway of the Lusitania, "dem Britishers dunno deir own slang. No, dey don't. Straight!

"I took in deir law courts one day in Lunnon. Chee, dey didn't know what a toff was dere. Toff—deir own slang, mind ye—and dey didn't know it! Straight! Chee!

"A custer—dat's a huckster—he sez, sez he, dat a guy wot he'd swiped was a toff.

"'Wot's a toff?' says his nibs, de head jedge.

"'A toff,' says a lawyer, 'is a guy wot wears fine close, yer honor. But yer honor, a real toff is a gent, a genuwine gent.'

"'Why, I t'ought,' says another lawyer, 'dat a toff was a bloke wot wore an eye-glass.'

"Den de head jedge he droppeil his own eye-glass outer his eye and he says:

"'O' course, dough, dere's many well-known exceptions to de rule.'

"Den dey all laughed, but I flew de coop disgusted.

"'Lawyers!' says I to meself. 'And dey dunno their own slanguage!'"—Minneapolis Journal.

It Looks That Way. A Chinese thus describes a trial in the English law courts: "One man is quite silent, another talks all the time, and twelve men condemn the man who has not said a word."

An Impossibility. Two eminent members of the Irish bar were quarreling some years ago so violently that from words they came to blows. The more powerful knocked down his adversary, exclaiming with vehemence: "You scoundrel, I'll make you behave yourself like a gentleman." The prostrate attorney, rising, answered with equal indignation: "No, sir, never; I defy you; you can't do it."